Supreme Court, U.S.
FILED
95-81 JUL 17 1995

No. _____

In The

Supreme Court of the United States

October Term, 1995

GERALD ELMER BALDERSON,

Petitioner,

versus

SHERRY MAY BALDERSON,

Respondent.

Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Idaho

PETITION FOR A WRIT OF CERTIORARI

JEAN R. URANGA
URANGA, URANGA & BIETER
P.O. Box 1678
Boise, Idaho 83701
(208) 342-8931
(208) 384-5686 (Fax)

Counsel for Petitioner,
Gerald Elmer Balderson

July 14, 1995

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

8 7pp

QUESTION PRESENTED

Whether the Supremacy Clause of the United States Constitution, 10 U.S.C. §1408(c)(3), and other provisions of the Uniformed Services Former Spouses' Protection Act preempt the Idaho State Court from ordering an active duty military member to begin making immediate payments to his ex-wife for her community property interest in his military retirement benefits before his retirement.

PARTIES TO THE PROCEEDING

All the parties to the proceeding in the Court whose judgment is sought to be reviewed are named in the caption of this Petition as filed in this Court.

TABLE OF CONTENTS

Page

Question Presented i

Parties to the Proceeding ii

Table of Authorities iv

Opinions Below 1

Jurisdiction 2

Federal Constitutional Provisions and Statutes Involved 2

Statement of the Case 3

I. Proceedings Below and How the Federal Questions Were Presented 3

II. Statement of Facts 6

Reasons for Granting the Writ 8

The Idaho Supreme Court erroneously affirmed the lower courts and ruled that the Supremacy Clause of the United States Constitution and 10 U.S.C. §1408(c)(3) did not preempt the trial court from ordering an active duty military member to begin making immediate payments to his ex-wife for her interest in his military retirement benefits 8

Conclusion 21

Appendix 1a

TABLE OF AUTHORITIES

Page

CASES:

Bewley v. Bewley, 116 Idaho 845, 780 P.2d 596 (1989) 15, 16

Bowlden v. Bowlden, 118 Idaho 89, 794 P.2d 1145 (Ct.App. 1989).....15, 16

Casas v. Thompson, 42 Cal.3d 131, 228 Cal.Rptr. 33, 720 P.2d 921, *cert. denied*, 479 U.S. 1012, 107 S.Ct. 659, 93 L.Ed.2d 713 (1986)..... 12

In re Marriage of Castle, 180 Cal.App.3d 206, 225 Cal.Rptr. 382 (Cal.App. 4 Dist. 1986).....9, 19, 20

Gallegos v. Gallegos, 788 So.2d 158 (Tex.App. – San Antonio 1990)..... 16

In re Marriage of Gillmore, 174 Cal.Rptr. 493, 629 P.2d 1 (1981).....5, 20

In re Hisquierdo, 19 Cal.3d 613, 566 P.2d 224 (1977).... 10

Hisquierdo v. Hisquierdo, 439 U.S. 572, 99 S.Ct. 802, 59 L.Ed.2d 1 (1979)..... *passim*

In re Marriage of Jacobson, 161 Cal.App.3d 465, 207 Cal.Rptr. 512 (Cal.App. 2 Dist. 1984).....5, 9, 18, 19

Kelson v. Kelson, 647 So.2d 959 (Fla.App. 1 Dist. 1994)..... 17

In re Marriage of Kraft, 119 Wash.2d 438, 832 P.2d 871 (Wash. 1992)..... 17

Mansell v. Mansell, 490 U.S. 581, 109 S.Ct. 2023, 104 L.Ed.2d 675 (1989)..... *passim*

Maxwell v. Maxwell, 796 P.2d 403 (Utah App. 1990).... 17

McCarty v. McCarty, 453 U.S. 210, 101 S.Ct. 2728, 69 L.Ed.2d 589 (1981)..... 11, 12, 13, 20

TABLE OF AUTHORITIES – Continued

Page

McMahan v. McMahan, 567 So.2d 976 (Fla.App. 1 Dist. 1990) 17

Mundell v. Mundell, 93.16 ISCR 911 (August 5, 1993) 16

In re Marriage of Scott, 156 Cal.App.3d 251, 202 Cal.Rptr. 716 (Cal.App. 4 Dist. 1984) 5, 9, 18, 19

Sherry v. Sherry, 108 Idaho 645, 701 P.2d 265 (Ct.App. 1985) 15

Wright v. Wright, 594 So.2d 1139 (La.App.3d 1992) 17

JUDICIAL CODE:

10 U.S.C. §1408 .....8, 12

10 U.S.C. §1408(c)(1) 8, 12, 14

10 U.S.C. §1408(c)(3) ..... *passim*

10 U.S.C. §1408(e)(6) 14

28 U.S.C. §1257 2

CONSTITUTION OF THE UNITED STATES:

Article 6, Clause 2 .....2, 15

No. _____

In The

Supreme Court of the United States

October Term, 1995

GERALD ELMER BALDERSON,

Petitioner,

versus

SHERRY MAY BALDERSON,

Respondent.

Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Idaho

PETITION FOR A WRIT OF CERTIORARI

The Petitioner, GERALD ELMER BALDERSON, respectfully prays that a Writ of Certiorari issue to review the Opinion and Judgment of the Supreme Court of the State of Idaho entered in this matter on May 22, 1995. This Petition is filed within ninety (90) days of the entry of the Opinion and Judgment.

OPINIONS BELOW

The Judgment and Decree of Divorce with the attached Findings of Fact and Conclusions of Law of the Magistrate Court of the Fourth Judicial District of the State of Idaho, entered December 28, 1992, is reprinted in

the Appendix to this Petition, at pages 1a through 20a. The Memorandum Decision and Order on appeal to the District Court of the State of Idaho, entered June 9, 1993, is reprinted in the Appendix to this Petition, at pages 21a through 32a. The Opinion of the Idaho Court of Appeals, entered March 22, 1994, is reprinted in the Appendix to this Petition at pages 33a through 45a. The Opinion of the Idaho Supreme Court, entered May 22, 1995, is reprinted in the Appendix to this Petition, at pages 46a through 57a.

JURISDICTION

The jurisdiction of this Honorable Court is invoked pursuant to 28 U.S.C. §1257, on the grounds that the Idaho Supreme Court, the highest court in the State of Idaho, on May 22, 1995, rendered an erroneous decision regarding the preemptive effect of 10 U.S.C. §1408(c)(3) and rights and privileges claimed under the Supremacy Clause and the Uniformed Services Former Spouses' Protection Act.

FEDERAL CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the following provisions of the Constitution of the United States:

Article 6, Clause 2

> This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be

> made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding.

The federal statute involved is 10 U.S.C. §1408(c)(3) which provides:

> This section does not authorize any court to order a member to apply for retirement or retire at a particular time in order to effectuate any payment under this section.

STATEMENT OF THE CASE

I. Proceedings Below and How the Federal Questions Were Presented.

The Petitioner contends 10 U.S.C. §1408(c)(3) and other provisions of the Uniformed Services Former Spouses' Protection Act precluded the trial court, under the Supremacy Clause of the United States Constitution, from ordering the Petitioner to pay his ex-wife a monthly amount out of his post-divorce, active duty pay until he retires for her interest in his military retirement benefits. The Petitioner contends that 10 U.S.C. §1408(c)(3) prohibits the Court from doing indirectly what it cannot do directly.

The federal questions involved in this case were first presented to the trial court and at each stage of the three levels of appeal.

During briefing following the divorce trial, the Petitioner alleged and argued that the Uniformed Services

Former Spouses' Protection Act (USFSPA), specifically 10 U.S.C. §1408(c)(3), precluded the Court from ordering an active military member to immediately begin making payments for the wife's community interest in his future retirement benefits. (Appendix, p. 15a, Paragraph 16.) The trial court rejected this argument, citing three California cases, and concluded that "the USFSPA does not prevent this court from awarding the non-employee spouse his or her interest in the disposable military retirement pay before the employee spouse actually retires." (Appendix, p. 16a, Paragraph 17.) On November 13, 1992, Honorable Michael Dennard, Magistrate Judge, issued Findings of Fact and Conclusions of Law requiring the Petitioner to immediately begin paying his ex-wife the amount of $739.55 per month as her percentage share of his military retirement benefits even though the Petitioner had not yet retired. The Magistrate Court further ruled that, when the Petitioner actually retired, that monthly amount would be paid directly to his ex-wife by the military under the Uniformed Services Former Spouses Protection Act. (Appendix, p. 4a, Paragraph 11.) Pursuant to these Findings of Fact and Conclusions of Law, a Judgment and Decree of Divorce was entered December 28, 1992. (Appendix, p. 1a.)

The Petitioner filed an appeal to the District Court and the Respondent filed a cross-appeal. On June 9, 1993, Honorable Robert Newhouse, District Judge, issued a Memorandum Decision and Order. The District Court rejected the Petitioner's preemption argument and stated that he did not read *Mansell v. Mansell*, 490 U.S. 581 (1989) as broadly as the Petitioner. (Appendix, p. 26a.) The District Court reversed the Magistrate Court with respect

to reserving jurisdiction to calculate future disposable retired pay at the time of actual retirement, but affirmed the Magistrate Court on all other issues on appeal, including the order for immediate payment for the ex-wife's interest in future benefits. (Appendix, p. 28a.)

The Petitioner appealed the District Court Decision to the Idaho Court of Appeals. The Idaho Court of Appeals affirmed the District Court and rejected the Petitioner's argument that the trial court order violated 10 U.S.C. §1408 and the Supremacy Clause. (Appendix, p. 41a.) The Court of Appeals ruled that since the USFSPA does not directly address the situation where a military member eligible for retirement has been ordered to make payments before actual retirement, the trial court's order was affirmed. (Appendix, p. 38a.) The Court of Appeals relied upon the same California cases which had been cited by the trial court.

The Petitioner requested and obtained review by the Supreme Court of the State of Idaho. With respect to the Supremacy Clause issue, the Idaho Supreme Court upheld the Idaho Court of Appeals. (Appendix p. 49a.) The Idaho Supreme Court acknowledged the limitations on the grant of authority to the State through the USFSPA, but concluded the trial court's order did not violate the Supremacy Clause because "instead of awarding Sherry an interest in the pension benefits, which the Court could not do, it awarded Sherry the value of a sum equal to her interest in the pension benefits." (Appendix, p. 50a.) Honorable Byron Johnson, Supreme Court Justice, dissented and stated:

> In my view, the magistrate judge's order requiring Gerald to begin making immediate payments to Sherry for her interest in Gerald's military retirement benefits violates the Supremacy Clause of the U.S. Constitution because 10 U.S.C. §1408(c)(3) and other provisions of USFSPA preempt the judge's authority to do so. (Appendix, p. 57a.)

II. Statement of Facts

The Petitioner and the Respondent were married August 20, 1970, in Council, Idaho. (Appendix, p. 7a, ¶ 1.) Prior to the date of the marriage, the Petitioner had entered active duty in the Navy on May 20, 1969, and had been in the Navy for fifteen months when he married the Respondent. (Appendix, 7a, ¶ 3.) In 1973, the Petitioner left the Navy for approximately ten months and worked as a lumberjack in Council, until he and his wife jointly decided he would re-enter the Navy in 1974. (Appendix, p. 7a, ¶ 4.) The Petitioner testified it was agreed between himself and his wife, at the time of re-enlistment, that the Navy would be his career. (Appendix, p. 7a, ¶ 4.)

At the time of the trial, the Petitioner had 22 years and 5 months, or a total of 269 months of active duty credits. (Appendix, p. 8a, ¶ 5.) The Petitioner was on active duty for 254 months of the marriage. (Appendix, p. 8a, ¶ 6.)

The Petitioner became eligible to retire after 20 years of active service. (Appendix, p. 8a, ¶ 7.) Instead of retiring, the Petitioner re-enlisted, became a commissioned officer and is still on active duty. (Appendix, p. 8a, ¶ 8.)

The Petitioner plans to complete 30 years of military service and retire in eight years. (Appendix, p. 9a, ¶ 12.) At the time of trial, the Petitioner was 42. Consequently, he would be 50 years old at the time of retirement. No evidence was presented that the Petitioner's retirement plans were based upon any desire or intent to impair the Respondent's receipt of retirement benefits. Rather, the evidence established the Petitioner's planned retirement date is consistent with the parties' mutual, original intent that the Navy would be the Petitioner's career.

The Petitioner's current base pay was $2,829.90 at the time of trial, and the trial court found:

> 9. If Gerald retired as of the date of trial at the W3 pay grade, he would have been entitled to receive 2 1/2 percent of his basic pay for that grade ($2,829.90), multiplied by the total years of active service. In this calculation, less than six months of a year is disregarded while more than six months counts as an additional year of service. Thus, Gerald's retirement benefit calculated as of trial would be 2.5% of $2,829.90 multiplied by 22 years, or $1,556.45 per month.
>
> 10. The community portion of this amount would be 254/269 times $1,566.45, or $1,479.10 per month.

(Appendix, p. 8a, ¶ 9-10.)

The trial court ordered the Petitioner to begin paying the Respondent $739.55 per month as her share of his retirement benefits until he actually retires, at which time the monthly sum would be paid directly to the Respondent under the USFSPA. (Appendix, p. 18a, ¶ 22.)

REASONS FOR GRANTING THE WRIT

The Idaho Supreme Court erroneously affirmed the lower courts and ruled that the Supremacy Clause of the United States Constitution and 10 U.S.C. §1408(c)(3) did not preempt the trial court from ordering an active duty military member to begin making immediate payments to his ex-wife for her interest in his military retirement benefits.

The federal statutes which grant state courts authority to distribute military retirement benefits in divorce proceedings are found in 10 U.S.C. §1408, known as the Uniformed Services Former Spouses' Protection Act. These statutes grant authority to state courts to treat "disposable" military retired pay as property of the member and spouse in accordance with local law. However, the authority granted by these federal statutes is conditional and limited.

This conditional and limited grant of authority is expressly stated in 10 U.S.C. §1408(c)(1) which provides:

> *Subject to the limitations of this section,* a court may treat disposable retired pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court. . . . (Emphasis added.)

One such express limitation is found at 10 U.S.C. §1408(c)(3) which provides:

> This section does not authorize any court to order a member to apply for retirement or retire at a particular time in order to effectuate any payment under this section.

The Petitioner contends these federal statutes precluded the trial court, under the Supremacy Clause of the United States Constitution, from ordering the Petitioner to pay his ex-wife a monthly amount out of his post-divorce pay until he retires. The trial court's Order severely penalizes the Petitioner because he has chosen not to retire. Because the Petitioner has chosen not to retire, as is his right under 10 U.S.C. §1408(c)(3), the Court has ordered him to pay $70,944 or $739 per month for eight years, as the penalty for that choice. The Petitioner contends that 10 U.S.C. §1408(c)(3) prohibits the State court from doing indirectly, what it cannot do directly.

The trial court and the Idaho appellate courts rejected the Petitioner's argument based, in part, on the authority of three California cases. These cases are: *In re Marriage of Scott*, 156 Cal.App.3d 251, 202 Cal.Rptr. 716 (Cal.App. 4 Dist. 1984); *In re Marriage of Jacobson*, 161 Cal.App.3d 465, 207 Cal.Rptr. 512 (Cal.App. 2 Dist. 1984); *In re Marriage of Castle*, 180 Cal.App.3d 206, 225 Cal.Rptr. 382 (Cal.App. 4 Dist. 1986). The Petitioner submits the Idaho State court decisions are erroneous.

It is well settled that, pursuant to the Supremacy Clause of the United States Constitution, federal law can clearly preempt state law in certain areas of domestic relations. This concept was set forth by the United States Supreme Court in the case of *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 99 S.Ct. 802, 59 L.Ed.2d 1 (1979). In that case, the Court considered the division of retirement benefits payable to railroad employees under the Railroad Retirement Act. The United States Supreme Court noted:

> Like Social Security, and unlike most private pension plans, railroad retirement benefits are not contractual. Congress may alter, and even eliminate, them at any time. This vulnerability to congressional edict contrasts strongly with the protection Congress has afforded recipients from creditors, taxgatherers, and all those who would "anticipate" the receipt of benefits. 439 U.S. at 575-76.

In the *Hisquierdo* case, two lower California courts had ruled the Supremacy Clause preempted state law in the area of these benefits. The Supreme Court of California overruled the lower courts and stated there was no evidence Congress intended to prevent a community property state from recognizing a spouse's community interest in a railroad retirement plan. *In re Hisquierdo,* 19 Cal.3d 613, 566 P.2d 224 (1977). The United States Supreme Court disagreed and stated:

> . . . On the rare occasion when state family law has come into conflict with a federal statute, this Court has limited review under the Supremacy Clause to a determination whether Congress has "positively required by direct enactment" that state law be pre-empted. 439 U.S. at 581.

In reviewing the nature of railroad retirement benefits, the Court noted compulsory federal taxes finance those benefits and the statutes are adopted by Congress to ensure the benefits are actually received by the beneficiary. The statutory purpose is also to create a national uniformity which "prevents the vagaries of state law from disrupting the national scheme, and guarantees a national uniformity that enhances the effectiveness of congressional policy." 439 U.S. at 584. Consequently, the

Court ruled that with respect to railroad retirement benefits, that area has been preempted by federal law. In the *Hisquierdo* case, the wife argued that, notwithstanding the federal statutory scheme, she could pursue an offsetting award of other available community property. The United States Supreme Court rejected that argument. The Court stated:

> An offsetting award, however, would upset the statutory balance and impair petitioner's economic security just as surely as would a regular deduction from his benefit check. The harm might well be greater. . . . 439 U.S. at 588.

Thereafter, the United States Supreme Court reaffirmed these concepts in the case of *McCarty v. McCarty*, 453 U.S. 208, 101 S.Ct. 2728, 69 L.Ed.2d 589 (1981), when the United States Supreme Court overturned another California appellate decision. In the *McCarty* case, the United States Supreme Court held that federal law precludes a state court from dividing military non-disability retired pay pursuant to state community property laws. The United States Supreme Court made various observations about non-disability military retirement pay. The Court noted the military non-disability retirement system has been "as much a personnel management tool as an income maintenance method," and has been used by the military to create an orderly pattern of promotion and to provide an inducement for recruiting and re-enlistment. 453 U.S. at 213. The United States Supreme Court further noted the military retirement system is noncontributory, but is instead funded by annual congressional appropriations. 453 U.S. at 214. The United States Supreme Court

ruled that application of community property principles to military retirement pay was preempted by federal law.

The general effects of the *McCarty* case were minimized by enactment by the United States Congress of the Uniformed Services Former Spouses' Protection Act, 10 U.S.C. §1408, in 1982. However, the United States Supreme Court has ruled that this 1982 federal act does not give state courts unlimited or unconditional discretion in the area of military retirement benefits.

In the case of *Mansell v. Mansell*, 490 U.S. 581, 109 S.Ct. 2023, 104 L.Ed.2d 675 (1989), the United States Supreme Court considered whether a state court may divide military disability benefits pursuant to a divorce where the military employee waived retirement pay in order to receive such benefits. The United States Supreme Court clearly ruled that state courts may not divide such disability benefits even where an employee has waived military retirement pay, which can be divided, to receive the disability benefits, which cannot be divided.

Justice Thurgood Marshall, in a 7-2 decision, reviewed a decision of the California Court of Appeals. The California Court, relying upon the case of *Casas v. Thompson*, 42 Cal.3d 131, 228 Cal.Rptr. 33, 720 P.2d 921, *cert. denied*, 479 U.S. 1012, 107 S.Ct. 659, 93 L.Ed.2d 713 (1986), held that, based upon the passage of the Uniformed Services Former Spouses' Protection Act, federal law no longer preempted state community property law. The United States Supreme Court disagreed and stated:

> It is clear from both the language of the Former Spouses' Protection Act, see, *e.g.*, §1408(c)(1), and its legislative history, see, *e.g.*,

> H.R.Conf.Rep. No. 97-749, p. 165 (1982); S.Rep. No. 97-502, pp. 1-3, 16 (1982), U.S.Code Cong. & Admin.News 1982, p. 1555, that Congress sought to change the legal landscape created by the *McCarty* decision. Because pre-existing federal law, as construed by this Court, completely pre-empted the application of state community property law to military retirement pay, Congress could overcome the *McCarty* decision only by enacting an affirmative grant of authority giving the States the power to treat military retirement pay as community property. Cf. *Midlantic Nat. Bank v. New Jersey Dept. of Environmental Protection*, 474 U.S. 494, 501, 106 S.Ct. 755, 759-60, 88 L.Ed.2d 859 (1986).
>
> The appellant and appellee differ sharply on the scope of Congress' modification of *McCarty*. Mrs. Mansell views the Former Spouses' Protection Act as a complete congressional rejection of *McCarty's* holding that state law is pre-empted; she reads the Act as restoring to state courts all pre-*McCarty* authority. Major Mansell, supported by the Solicitor General, argues that the Former Spouses' Protection Act is only a partial rejection of the *McCarty* rule that federal law preempts state law regarding military retirement pay. 109 S.Ct. at 2028.

The United States Supreme Court accepted Major Mansell's argument that the federal legislation is only a partial rejection of the *McCarty* rule. The Court ruled that, based upon the Act's definitional section defining "disposal retired or retainer pay", state courts have been granted only limited authority to treat disposal retired pay as community property. States have not been granted the authority to treat total retired pay as community

property. 109 S.Ct. at 2028. Further, the United States Supreme Court interpreted 10 U.S.C. §1408(e)(6), which provides that the section does not relieve a member of liability for other payments which a military employee might be ordered to pay, and stated:

> In our view, the savings clause serves the limited purpose of defeating any inference that the federal direct payments mechanism displaced the authority of state courts to divide and garnish property not covered by the mechanism. 109 S.Ct. at 2029.

The Court noted that 10 U.S.C. §1408(c)(1) specifically and plainly limits the extent to which state courts can treat military retirement pay as community property to "disposable retired pay." 109 S.Ct. at 2029.

The United States Supreme Court went on to state that other language of the USFSPA indicates a Congressional intent to preempt the authority of state courts in certain other areas. In particular, the United States Supreme Court stated:

> Section 1408(c)(3) provides that a state court cannot order a military member to retire so that the former spouse can immediately begin receiving her portion of military retirement pay. 109 S.Ct. at 2029.

In footnote 11, the United States Supreme Court noted:

> There was some concern expressed at the Senate hearings on the Act that state courts could direct a military member to retire. See, *e.g.*, Hearings before the Subcommittee on Manpower and Personnel of the Senate Committee on Armed Services, 97th Cong., 2d Sess., 132-133

> (1982) (Sen. Exon); *id.*, at 70-71 (veterans' group; *id.*, at 184 (Air Force). Thus the Senate version of the bill contained §1408(c)(3) in order to ensure that state courts did not have such power, S.Rep. No. 97-502, at 17, and at conference the House agreed to add the provision. H.R.Conf.Rep. No. 97-749, p. 167 (1982). 109 S.Ct. at 2029.

The Court further noted that a bill which would have removed absolutely all federal preemption in the area of military retirement benefits died in the Senate Committee and the Uniformed Services Former Spouses' Protection Act that was adopted instead contains various conditions and restrictions on the ability of state courts to deal with military retirement benefits. The United States Supreme Court noted Congress was concerned as well with protecting the interests of the military members. 109 S.Ct. at 2031.

The Idaho Supreme Court has also recognized federal law can preempt state courts in certain specific areas. In the case of *Bowlden v. Bowlden*, 118 Idaho 89, 794 P.2d 1145 (Ct.App. 1989), the Idaho Court of Appeals noted that federal law has preempted state community property law under the Supremacy Clause of the United States Constitution, United States Constitution, Article 6, Clause 2, in the area of Social Security benefits. See also, *Sherry v. Sherry*, 108 Idaho 645, 701 P.2d 265 (Ct.App. 1985).

In the case of *Bewley v. Bewley*, 116 Idaho 845, 780 P.2d 596 (1989), the Idaho Court of Appeals adopted the ruling of *Mansell v. Mansell, supra*, that military disability pay must be treated as separate property even if a spouse has chosen voluntarily to receive the disability pay instead of retirement pay. More importantly, the *Bewley* Court

adopted the rationale of *Hisquierdo* that, where retirement benefits are preempted by federal law, an offsetting award of community property cannot be imposed. 116 Idaho at 847.

The Idaho Supreme Court reaffirmed that state law may be preempted by federal law if the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Mundell v. Mundell*, 124 Idaho 152, 857 P.2d 631 (S.Ct. 1993.) The Idaho Supreme Court reviewed the *Bowlden* and *Bewley* cases and stated:

> . . . a strong federal interest was found to be present in those cases because the benefits involved, federal disability and social security benefits, were received from federal programs which were funded by federal taxes and paid pursuant to federal guidelines.
>
> . . . Furthermore, the benefits in the *Bowlden* and *Bewley* cases were subject to an "anti-attachment" clause which protected such benefits from all legal process. 124 Idaho at 154.

These same features exist with respect to military retirement benefits.

Various states have accepted and cited the *Mansell* decision for the proposition that the USFSPA still results in preemption of state court authority. In *Gallegos v. Gallegos*, 788 So.2d 158 (Tex.App. – San Antonio 1990), the Texas Court stated that the USFSPA "did not restore authority to the States to determine all types of military retirement pay." 788 So.2d at 160. Rather, based upon the *Mansell* decision, the USFSPA only granted state courts discretion to divide "disposable retired pay" and states

were not granted authority to treat all types of military retirement pay as community pay. In the case of *Wright v. Wright*, 594 So.2d 1139 (La.App.3d 1992), the Louisiana Court of Appeals noted that the USFSPA only granted states authority to deal with "disposable retired or retainer pay," and even that authority was limited by other provisions of the Act. See also, *McMahan v. McMahan*, 567 So.2d 976 (Fla.App.1 Dist. 1990); *Kelson v. Kelson*, 647 So.2d 959 (Fla.App.1 Dist. 1994); *Maxwell v. Maxwell*, 796 P.2d 403 (Utah App. 1990); *In re Marriage of Kraft*, 119 Wash.2d 438, 832 P.2d 871 (Wash. 1992).

In the present case, both the Idaho Court of Appeals and the Idaho Supreme Court accepted the Petitioner's contention that the *Mansell* decision establishes there is still some degree of federal preemption remaining after the passage of the USFSPA, but noted that fact did not change their analysis. The Idaho Court of Appeals ruled that since the language of the USFSPA did not expressly prohibit the order entered in this case, the trial court's authority was implied and the order did not violate 10 U.S.C. §1408(c)(3). The Court of Appeals noted that Congress had a dual purpose in passing the USFSPA, that is, defeating the harsh effects of McCarthy and protecting the member's freedom to choose when to retire. They stated:

> We believe that ordering a member to begin making payments before actual retirement addresses both concerns. The nonmember spouse's community interest is protected while the member spouse is not forced to retire. (Appendix, p. 41a.)

The Idaho Court of Appeals relied heavily upon the three California cases which will be discussed.

The Idaho Supreme Court provided even less discussion on the preemption issue. The Idaho Supreme Court stated:

> Because the magistrate court ordered a distribution of the sum equal to Sherry's interest in the military retirement benefits, rather than distributing the pension benefits themselves, we hold that the magistrate court did not err in concluding that Idaho law was not preempted by 10 USC §1408(c)(3). (Appendix, p. 49a.)

In fact, since there were no other community property assets, the effect of the trial court order was to divide active duty pay. In addition, contrary to the Idaho Supreme Court's finding, the order did distribute pension benefits. The trial court order clearly provided that once the Petitioner actually retired, the monthly amount would be paid directly by the military. (Appendix, p. 4a.)

The Petitioner submits the Idaho trial court and appellate court decisions are erroneous for three reasons. First, the decisions are erroneously based on three California cases. Second, the Idaho court rulings allow the Idaho courts to do indirectly what they are prohibited from doing directly. Third, the trial court order improperly divides active duty pay, not "disposable retired pay."

First, the Petitioner contends the Idaho Court decisions were erroneously based upon three California cases. These cases are *In re Marriage of Scott*, 156 Cal.App.3d 251, 202 Cal.Rptr. 716 (Cal.App. 4 Dist. 1984); *In re Marriage of Jacobson*, 161 Cal.App.3d 465, 207 Cal.Rptr. 512 (Cal.App.

2 Dist. 1984); *In re Marriage of Castle*, 180 Cal.App.3d 206, 225 Cal.Rptr. 382 (Cal.App. 4 Dist. 1986). These cases are inapplicable and are not dispositive in this pending action for various reasons.

All three cases were adopted prior to the United States Supreme Court decision in *Mansell v. Mansell, supra*, and each of these three California cases is based upon the incorrect premise that the Uniformed Services Former Spouses' Protection Act totally eliminated all federal preemption in this area. Consequently, they have been impliedly overruled by *Mansell*. The earliest of these cases, *In re Marriage of Scott*, 202 Cal.Rptr. at 718, noted its assumption that the federal act expressed a general congressional intent that military pensions be treated similarly to all other pensions under applicable state community property law. The *Scott* Court rejected an argument that the division of military benefits was restricted to "disposable retired or retainer pay," and held they could divide gross pay. 202 Cal.Rptr. at 718. The decision in the *Mansell* case has established the invalidity of the *Scott* decision. Further and most importantly, in the *Scott* case, the California Court did not even consider the effect or language of 10 U.S.C. § 1408(c)(3).

Similarly, the case of *In re Marriage of Jacobson*, 207 Cal.Rptr. at 517, was again incorrectly based upon an express assumption that the federal act had eliminated any and all federal preemption in the area of military retirement and had returned unconditional discretion to state courts to divide property. The Court only briefly referred to 10 U.S.C. §1408(c)(3) with no detailed discussion of the preemptive effect of that statute.

In re Marriage of Castle, supra, like the *Scott* case, did not even refer to or consider 10 U.S.C. §1408(c)(3). The *Castle* decision was also based upon the erroneous assumption that the federal act was intended to abrogate all applications of the *McCarty* decision. 225 Cal.Rptr. at 385. The Idaho trial court and Court of Appeals referred specifically to the *Castle* case and the argument that the Congress was made aware of the case of *In re Marriage of Gillmore,* 174 Cal.Rptr. 493, 629 P.2d 1 (1981), when the USFSPA was adopted. 225 Cal.Rptr. at 387. In *Gillmore,* the California Supreme Court ruled that an employee spouse cannot deprive a non-employee spouse of an interest in retirement benefits by a unilateral choice to postpone retirement. However, as noted by the United States Supreme Court in *Mansell,* 10 U.S.C. §1408(c)(3) was specifically adopted because the Congress wished to avoid the possible effects of cases like *Gillmore* which might have allowed state courts to order payments before retirement.

Second, the Petitioner contends that the Idaho trial court order violates 10 U.S.C. §1408(c)(3) and the Supremacy Clause for the reason that the trial court is doing indirectly what it cannot do directly. That is, 10 U.S.C. §1408(c)(3) clearly prohibits a court from ordering a military member to retire. Conversely, the state court should not be allowed to penalize the military member for not retiring by requiring him to pay the monthly amount the spouse would have received if he had retired. As noted by the United States Supreme Court in *Hisquierdo v. Hisquierdo,* 439 U.S. 572, 99 S.Ct. 802, 59 L.Ed.2d 1 (1979), where an area has been preempted by federal law, a state

court may not make an offsetting award to ameliorate the effects of the federal preemption. 439 U.S. at 588.

Third, the Petitioner contends that the Idaho court rulings are improper because the effect of the trial court ruling is to divide and order distribution of the Petitioner's *active duty pay* since that is the only source of funds available. The case of *Mansell* clearly established that state courts' authority was expressly restricted to division of "disposable *retired* pay". There is absolutely no grant of authority to divide active duty pay. In addition, the *Mansell* case clearly established that state courts are preempted from dealing with military pay unless granted express authority.

CONCLUSION

In sum, the Petitioner submits the trial court order violates the Supremacy Clause of the United States Constitution because 10 U.S.C. §1408(c)(3) and other provisions of the federal Uniformed Services Former Spouses' Retirement Act preclude and preempt the Court from ordering the Petitioner to begin making immediate payments to the Respondent for her interest in the Petitioner's military retirement benefits when he has exercised his federal statutory right not to retire.

The authorities cited by the Petitioner establish that state courts can divide military retirement benefits only by authority granted by federal law. Such a division cannot disregard federal law and federal law clearly

establishes that the Court cannot order or require a military person to retire. Conversely, the Court cannot penalize the Petitioner for his choice not to retire.

Based upon the foregoing, the Petitioner requests this Honorable Court to issue a Writ of Certiorari to review the Opinion and Judgment of the Supreme Court of the State of Idaho.

RESPECTFULLY SUBMITTED This 14th day of July, 1995.

URANGA, URANGA & BIETER
JEAN R. URANGA, Of the Firm
Attorneys for Petitioner
714 North 5th Street
P.O. Box 1678
Boise, Idaho 83701

APPENDIX

CONTENTS OF APPENDIX

PAGE

Judgment and Decree of Divorce of the Magistrate Court Division of the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Ada 1a

Memorandum Decision and Order of the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Ada 21a

Opinion of the Court of Appeals of the State of Idaho 33a

Opinion of the Supreme Court of the State of Idaho 46a

DEBRHA J. CARNAHAN
WILSON, CARNAHAN & McCOLL
420 W. Washington
P.O. Box 1544
Boise, Idaho 83701
(208) 345-9100

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE
FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO,
IN AND FOR THE COUNTY OF ADA

SHERRY MAY BALDERSON, Plaintiff vs. GERALD ELMER BALDERSON, Defendant.	Case No. 11195-D JUDGMENT AND DECREE OF DIVORCE

THIS CAUSE Having come on regularly to be heard on the 26th day of August, 1992, before the Court without a jury, the Plaintiff appearing in person and by her attorney DEBRHA J. CARNAHAN; and the Defendant appearing in person by and through his attorney JEAN URANGA, IT IS HEREBY ORDERED AS FOLLOWS:

WHEREUPON, oral and documentary evidence was introduced and the cause being submitted to the Court for disposition; and the Court being fully advised in the premises finds and concludes as follows:

1. That the Plaintiff herein is now, and for more than six (6) weeks last past and next preceding the commencement of this action and the filing of the Complaint herein has been a bona fide resident and domiciled in the State of Idaho.

2. That the Plaintiff and the Defendant were intermarried on or about the 20th day of August, 1970, at Council, Adams County, Idaho and ever since have been and now are husband and wife.

3. That two children have been born as issue of said marriage, namely, STACEY MARIE BALDERSON, born March 4, 1971 and ROBERT LOYD BALDERSON, born September 20, 1974. Both children are over the age of majority.

4. That during the marriage of the parties they have acquired certain items of community property and certain debts.

5. That irreconcilable differences exist in the marriage.

6. That the allegations contained in Plaintiff's Complaint are sustained by the evidence, and the matters so alleged and proved on behalf of the Plaintiff are sufficient to entitle her to the relief prayed for and as herein provided.

WHEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. That the marriage heretofore and now existing between the Plaintiff, SHERRY BALDERSON, and the Defendant, GERALD BALDERSON, be, and the same hereby is, dissolved, the Plaintiff being granted a divorce from the Defendant upon the grounds of irreconcilable differences, the said parties, and each of them, being hereby freed and absolutely relieved from the bonds of matrimony and all obligations

thereof, the Plaintiff and Defendant being, and each of them is, restored to the status of a single person.

2. That the children of the parties, namely, STACEY and ROBERT BALDERSON, are over the age of majority. Defendant shall assume responsibility for the Citibank loan which Plaintiff incurred for ROBERT'S eduction [sic]. ROBERT BALDERSON shall be responsible for the loan in his own name.

3. The following debts shall be paid from the parties' cash assets:

   Dr. Tingy
   Aardvark (Dandy Lion)
   Bankcard
   Terry Clapp
   Sears
   Emporium

4. Each party shall assume and pay all debts incurred by them, other than those debts specified herein.

5. Defendant shall receive the IRA in his name.

6. Plaintiff shall receive the IRA in her name.

7. Each party shall have as their separate property, that personal property which they currently possess.

8. The Note from Fred and Kathy Neiko (from the sale of the community residence) shall belong to Gerald Balderson.

9. Sherry Balderson shall receive the check in the amount of $1,588.00 from the title company and the federal tax refund as well as any cash remaining in

the community accounts after the payment of all community debts.

10. Defendant shall pay Plaintiff $500.00 for ten (10) months (set up in an allotment) beginning the 1st day of October, 1992.

11. Defendant's military retirement benefit (based on his current pay grade and years of service) as of the date of trial is $1,556.45 per month; the community portion of the benefit is $1,479.10 per month; there is insufficient community property to make an offsetting award of community property. Plaintiff's one-half (1/2) interest in the community retirement benefit is $739.55 per month; based upon the facts of this case, (as set forth in this Court's memorandum decision which is attached hereto and incorporated herein as Exhibit "A") Defendant shall pay Plaintiff a monthly amount equal to the share of the benefit which she would have received if Defendant were retired (based on his current pay grade and years of service); Defendant shall pay Plaintiff $739.55 each month from the date of the divorce until such time as he does retire; upon Defendant's retirement, Plaintiff's monthly sum shall be paid to her directly under the U.S.F.S.P.A.

12. Defendant shall make the election to purchase an annuity for Plaintiff under the Survivor Benefit Plan, if Plaintiff chooses; Plaintiff shall bear the cost of the annuity. If the election can be exercised after twenty (20) years of service, but before actual retirement, the cost of the annuity will be paid by Defendant but deducted from his payment of $739.55 to Plaintiff;

after retirement, the cost of the annuity shall come from Plaintiff's share of the monthly retirement benefit; Plaintiff may make (and has made) an election for survivor benefits within sixty (60) days of the entry of the decree of divorce (see Exhibit "B" attached hereto and incorporated herein), or at any subsequent time that Defendant is permitted to make such an election.

13. After retirement, Plaintiff will be entitled to a percent share of any cost of living increase awarded to Defendant; that percentage will be a fraction where the numerator is 254 months and the denominator is the total month of Defendant's military service at retirement.

DATED This 23 day of December, 1992.

MICHAEL DENNARD
JUDGE

IN THE DISTRICT COURT OF THE
FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO,
IN AND FOR THE COUNTY OF ADA

SHERRY MAY BALDERSON, Plaintiff vs. GERALD ELMER BALDERSON, Defendant.	Case No. 11195-D FINDINGS OF FACT AND CONCLUSIONS OF LAW

Appearances: Debrha [sic] J. Carnahan, for the plaintiff Jean R. Uranga, for the defendant

On August 26th, 1992, the above-entitled matter was called for trial. At that time, the parties announced that they had entered into a Stipulation of Facts, an unsigned copy of which was provided to the court, which was subject to certain oral modifications or clarifications described in open court. The stipulation reflected that there was no dispute over the character, value and division of all community property and debts with the exception of the community interest in the defendant's military retirement benefits. In fact, following the trial, an order was entered upon the parties' stipulation that provided for the division of property and debts except for the retirement benefits. At trial, evidence was presented on

the extent and divisibility of the military retirement benefits, and upon equities the court might consider in dividing those benefits. Post trial briefs were then submitted, the last of which was received on September 29th, 1992. The case was considered fully submitted on that date. The following findings of fact and conclusions of law are issued pursuant to Rule 52(a), I.R.C.P., on the remaining disputed issues:

FINDINGS OF FACT:

1. Sherry May Balderson (Sherry) and Gerald Elmer Balderson (Gerald), were married on August 20th, 1970, in Council, Idaho.

2. Two children were born as issue of this marriage. Stacy Marie Balderson was born on March 4th, 1971, and is thus, over the age of majority. Robert Loyd Balderson was born on September 20th, 1974. He reached age 18 shortly after the trial was completed. The parties' stipulation provided that Gerald would assume responsibility for a loan incurred to pay for Robert's education in lieu of any monthly award of support while Robert continues his education.

3. Gerald entered active duty in the Navy on May 20th, 1969. He had been in the Navy for precisely 15 months when he married Sherry.

4. In 1973, Gerald left the Navy and worked briefly as a lumberjack. He and Sherry agreed he should re-enlist and make the Navy his career. He again entered active duty in 1974 after a ten month absence, and has been on active duty ever since.

5. As of the date of trial, Gerald had 22 years and 5 months, or a total of 269 months of active duty credits.

6. Deleting the 15 months earned prior to marriage, he was on active duty for 254 months during the marriage.

7. Gerald became eligible to retire from active duty following 20 years of service. At that time he held a W2 pay grade.

8. Instead of retiring, Gerald entered into a reenlistment contract which provided for a promotion to a level W3 pay grade. Under that contract he agreed to forego retirement and remain on active duty until September of 1994.

9. If Gerald retired as of the date of trial at the W3 pay grade, he would have been entitled to receive 2 1/2 percent of his basic pay for that grade ($2,829.90), multiplied by the total years of active service. In this calculation, less than six months of a year is disregarded while more than six months counts as an additional year of service. Thus, Gerald's retirement benefit calculated as of trial would be 2.5% of $2,829.90 multiplied by 22 years, or $1,556.45 per month.

10. The community portion of this amount would be 254/269 times $1,566.45, or $1,479.10 per month.

11. The parties did not stipulate to, or submit evidence on the present value of the community portion of the military retirement benefits. Both acknowledge, however, there is insufficient property to make an offsetting award of other property equal to the lump sum value of the military retirement benefits.

12. Gerald does not plan to retire until he has 30 years of active duty, which will be in slightly less than 8 years. His benefits would be substantially greater with those additional years of service.

13. Gerald's current base pay is $2,829 per month. He also receives various housing or cost of living allowances which depend upon his obligation to support dependents and his service at sea. At present, he actually receives $1,800 every two weeks as gross pay. The difference between the sum of those two figures and his base pay represents the current level of allowances he receives.

14. Sherry will have difficulty meeting her monthly living expenses on her current level of income and has a present need and desire to immediately receive her share of the military retirement benefits rather than wait until Gerald retires in eight more years.

CONCLUSIONS OF LAW:

1. This court has jurisdiction over the parties and the subject matter of this action.

2. All issues in this case have been resolved by stipulation except for the valuation and distribution of the community interest in Gerald's military retirement benefits. Gerald has twenty-two years and five months of active duty with the Navy. Twenty-one years and two months of that time accrued during his marriage with Sherry. Although he could have retired after twenty years of active duty, he chose not to. He now plans to retire after thirty years of active duty.

3. Military retirement benefits, like other types of retirement benefits, to the extent they are earned during marriage, must be characterized as community property. *Maslen v. Maslen*, 121 Idaho 85, 822 P.2d 982 (1991); *Griggs v. Griggs*, 107 Idaho 123, 686 P.2d 68 (1984); *Shill v. Shill*, 100 Idaho 433, 599 P.2d 1004 (1979); *Ramsey v. Ramsey*, 96 Idaho 672, 535 P.2d 53 (1975).

4. However, the court may treat only the "disposable retired pay" as community property. 10 U.S.C.S. Section 1408(c)(1); *Mansell v. Mansell*, 490 U.S. 581, 109 S.Ct. 2023, 104 L.Ed.2d 675 (1989), impliedly overruling *Beesley v. Beesley*, 114 Idaho 536, 758 P.2d 695 (1988); *Bewley v. Bewley*, 116 Idaho 845, 780 P.2d 596 (Ct.App. 1989).

5. The value or extent of the community interest in retirement benefits must be established as of the time of divorce. *Maslen v. Maslen*, 121 Idaho 85, 822 P.2d 982 (1991); *Shill v. Shill*, 115 Idaho 115, 765 P.2d 140 (1988); *Desfosses v. Desfosses*, 120 Idaho 354, 815 P.2d 1094 (Ct.App. 1991).

6. If the employee spouse is eligible to retire but has not retired at the time of divorce, then the valuation of the community interest must be based upon the monthly sum which could have been received as of the date of divorce. *Maslen v. Maslen*, supra; *Shill v. Shill(II)*, supra.

7. Applying these principles to the facts found above, I find that as of the date of trial, based upon his current pay grade and years of service, Gerald had accumulated the right to receive a monthly benefit of $1,566.45 even though he had chosen not to retire. In the absence of any evidence that Gerald would have had

deductions from that amount permitted under 10 U.S.C.S. Section 1408(A)(4) if he had retired as of the date of trial, this amount will be considered his hypothetical disposable retired pay for the purpose of computing the value of the community interest. The community portion of that sum, which is based upon the years of service which accrued during the marriage, is $1,479.10. Sherry's one-half interest in this monthly sum would be $739.55.

8. Gerald is presently committed to remain on active duty until 1994. He received a promotion to his present pay grade as a result of that commitment. However, I conclude that this commitment to serve beyond the date of divorce does not affect the value of his retirement benefits. His commitment will merely delay his receipt of benefits, but he will at some point, enjoy the benefits of the pay grade he achieved during marriage. All increased benefits caused by his post-trial service, will be his exclusively. I see no reason why the community interest should not be valued as of the date of trial, upon Gerald's present pay grade and years of service.

9. Sherry has requested an immediate distribution of her share of these retirement benefits. She argues that she should not be deprived of her share of these benefits because of Gerald's decision to invoke a condition entirely within his control. Gerald, on the other hand, argues that an order for immediate payment would be contrary to the specific restrictions found in the USFSPA.

10. These issues have been specifically addressed in other jurisdictions. The majority view appears to follow the ruling in *In Re Marriage of Gillmore,* 174 Cal.Rptr. 493, 629 P.2d 1 (1981). In *Gillmore,* the California Supreme

Court held that an employee spouse cannot by his or her unilateral choice to postpone retirement, deprive the non-employee spouse of his or her interest in the retirement benefits. The non-employee spouse was entitled to immediate payment of her share of the retirement benefits.

11. Gerald points to a contrary view expressed in *Ruggles v. Ruggles*, 834 P.2d 940 (New Mexico 1992). In *Ruggles*, the New Mexico Supreme Court rejected the ruling in *Gillmore* for a number of reasons. First and foremost was the fact that *Gillmore* permitted a lump sum payment to the non-employee spouse before the date of retirement. In New Mexico, lump sum awards are not permitted. Pension benefits must be awarded on a "pay as it comes in" basis. Id. Next, the court was concerned about equalizing the risk that the retirement benefits may never actually be received. Requiring the non-employee to wait would ensure equality of risk. Finally, the court felt that the non-employee's rights were derivative of the community's rights. The non-employee should receive no greater right than that directly provided by the community asset itself. This means waiting until the actual benefits are received under the terms and conditions of the retirement plan.

12. Comparing the principles found in Idaho cases to these two divergent views, Idaho appears to be clearly more aligned with the *Gillmore* approach. Our Supreme Court has consistently approved of lump sum awards to the non-employee spouse since that method was established in *Ramsey*. Although *Shill I* approved of reserving jurisdiction to value and divide contingent pension benefits, there is no justification to extend that case beyond its facts. There the court was dealing with a non-vested,

contingent benefit, which would vest, if at all, within six months of the divorce. This is much different than a case where benefits are vested, matured, but not being received solely because of the decision of the employee spouse. Despite *Shill I*, our Supreme Court again approved the lump sum distribution method in *Maslen v. Maslen*, supra, as did our Court of Appeals in *Desfosses*, supra, where the employee spouse had not yet retired. Certainly, a lump sum award is an acceptable method of distribution in Idaho where the benefits are vested, matured and actually being received. *Shill v. Shill II*, supra; *Beesley v. Beesley*, 114 Idaho 536, 758 P.2d 695 (1988), impliedly overruled on other grounds by *Mansell v. Mansell*, 490 U.S. 581, 109 S.Ct. 2023, 104 L.Ed.2d 675 (1989).

13. In *Shill II* our Supreme Court acknowledged the risks inherent in making an immediate lump sum award, but gave its continued approval of such awards:

> Many of the above-cited cases deal with the "risks" which will be encountered by each of the spouses under various theories of distribution of pension benefits upon divorce. It is clear that there can be no amelioration of all risks which might be presented by the enumerable possible scenarios. If, as previously stated, a lump sum cash-out method were utilized, as seems possible in the instant case, the risks to the non-employee spouse would have been eliminated. However, the risk to the employee spouse of death preventing him from receiving any benefits, would remain. Nevertheless, such solution would have the merit of disentangling the parties and their affairs at a finite point in time. Id., p-120.

Unlike the New Mexico Supreme Court in *Ruggles*, our Supreme Court places more emphasis on the immediate right of each party to possess their share of the community property and disentangling the parties financially, than on the risks inherent in a lump sum cash-out.

14. In *Shill II*, our Supreme Court followed the reasoning of the Arizona Supreme Court in *Koelsch v. Koelsch*, 713 P.2d 1234 (Ariz. 1986), in ruling that a non-employee spouse has no right to share in increased retirement benefits which accrue following divorce. The *Koelsch* case also followed the *Gillmore* rule that one spouse cannot defeat the other's interest in retirement benefits by unilaterally choosing not to retire. The rationale for that decision was similar to that found in Idaho cases. Once a portion of the community retirement benefits is awarded to the non-employee spouse, it becomes that spouse's separate property, the use and control of which belongs exclusively to that individual. Id., p-1239.

15. Lump sum awards have been approved because of the long line of Idaho authority requiring the court to distribute community property in such a way as to give each party immediate control over their respective share. The court in *Gillmore* based its ruling on this same concept – the right of each spouse to utilize and control their share of benefits at the time of divorce. The court in Koelsch, a decision cited by our Supreme Court with approval on other issues, reached a similar conclusion. Both appear to be consistent with Idaho principles of community property law, while the *Ruggles* decision does not. Therefore, I conclude that an employee spouse cannot deprive the non-employee spouse of immediate enjoyment of his or her share of retirement benefits by

making a unilateral decision to continue working after the date of first eligibility for retirement.

16. In 1982, Congress passed the Uniformed Services Former Spouses Protection Act (USFSPA), 10 U.S.C. Section 1408. The USFSPA gave state courts the authority to characterize a service member's disposable military retirement pay as marital property and also provided for the direct distribution of the non-employee spouse's portion of those benefits under certain conditions. The Act prohibits state courts from ordering a service member to apply for retirement or to retire at some particular time in order to have payments distributed under the Act. 10 U.S.C. Section 1408(c)(3). Gerald argues this provision of the Act prohibits a court from making any award of benefits before actual retirement, otherwise a court would be indirectly forcing a service member to retire.

17. This issue has been specifically addressed in three California appellate decisions. In each decision, the court rejected Gerald's argument and awarded the non-employee spouse the present value of military retirement benefits even though the service member had not yet retired. *In Re Marriage of Scott*, 156 Cal.App.3d 251, 202 Cal.Rptr. 716 (Cal.App.4 Dist. 1984); *In Re Marriage of Jacobson*, 161 Cal.App.3d 465, 207 Cal.Rptr. 512 (Cal.App.2 Dist. 1984); *In Re Marriage of Castle*, 180 Cal.App.3d 206, 225 Cal.Rptr. 382 (Cal.App. 4 Dist. 1986). In *Castle* the court pointed out that the doctrine of *Gillmore* was specifically cited to the Senate prior to the passage of the USFSPA. See U.S.Code Cong. & Admin. News, pp. 1596, 1639. Yet, the act was passed giving the states power to apply their own local law to the characterization and division of disposable military retirement pay, subject

only to the specific limitations of the Act. Upon this authority, I conclude that the USFSPA does not prevent this court from awarding the non-employee spouse his or her interest in the disposable military retirement pay before the employee spouse actually retires.

18. The final issue to be addressed is the most difficult one. Even though Sherry has the right to immediate enjoyment of her share of the retirement benefits, valued at the time of divorce, how can the court effectively distribute those benefits to her under the particular circumstances of this case. A Qualified Domestic Relations Order is not applicable to military retirement benefits. Direct payment from the government under the USFSPA cannot be ordered until actual retirement. There is insufficient property to make an offsetting award of other property equal to the value of the retirement benefits. The only other option that has been specifically discussed and approved in Idaho is a lump sum judgment payable in installments within a reasonable time. *Ramsey v. Ramsey,* supra; *Beesley v. Beesley,* supra. However, I do not believe that these are the only alternatives this court can consider merely because they are the only ones which have been discussed by our appellate courts. The decisions cited above reflect that new alternatives are periodically reviewed and approved. While the *Ramsey* court appeared to lay down an unequivocal rule which required a lump sum award of the present value of retirement benefits to the non-employee spouse, the court subsequent [sic] acknowledged that an offsetting award of property would be acceptable, and direct monthly payments under USFSPA for military benefits or by a Qualified Domestic Relations Order for other qualified private

plans, could also be ordered. In *Maslen*, the court acknowledged the difficulty not only in valuing benefits under very different retirement plans, but also the difficulty in dividing those benefits. Rather than mandate particular treatment of retirement benefits in every case, the court stated "[W]e conclude that it is a better policy to allow the trial court sufficient discretion to consider the circumstances in each case to determine the most equitable manner for determining and dividing the marital portion of pension benefits". *Maslen v. Maslen*, supra.

19. The court in *Koelsch* provides some excellent guidance on the very dilemma facing this court. Where the right to receive retirement benefits has matured, but the employee spouse continues to work, the most preferable method is a lump sum award which is payable in full at a specified time, or payable in installments which may or may not correspond with the amount the employee spouse would have received if the employee spouse had retired. *Koelsch v. Koelsch*, supra, p-1242. This award should include the payment of interest and could be secured by a lien on any or all of the employee spouse's separate property. Id. However, if a lump sum award would be impossible or inequitable, the court could award the non-employee spouse a monthly amount equal to the share of the benefit which would have been received if the employee spouse had retired. Id. p-1243. If the employee spouse does retire, then both interests could be paid directly to each by the plan administrators, or, in case of military retirement, by the federal government. Id.

20. The last option which the court in *Koelsch* left open under very limited circumstances, would be to defer

all or part of the non-employee's monthly payments until the employee spouse retires. Under this alternative, however, the non-employee spouse would be entitled to recover all of the deferred payments with interest, the payment of which would be secured by a lien on the employee spouse's separate property or by a separate policy of insurance naming the non-employee spouse as irrevocable beneficiary in an amount sufficient to pay the differed payments and interest. Id., p-1243.

21. The objective in selecting the best alternative was described in *Koelsch* in the following way:

> We urge the parties and the trial court to be as creative and flexible as possible, within the guidelines provided in this opinion, to both guarantee that the non-employee spouse will receive his or her share of the pension benefits and to avoid the undesirable consequence of encouraging employees to retire against their wishes. p-1243.

22. I believe the best of the options described above would be that which would require Gerald to pay Sherry her $739.55 share of the retirement benefits she would have received had he chosen to retire as of the date of divorce until such time as he does retire when that sum can be paid directly to her under the USFSPA. I consider this to be the best option under the circumstances of this case for the following reasons: (1) there is not enough other community property to make a lump sum, offsetting award of other property to Sherry; (2) Gerald's income is limited and it would not appear to be feasible that he could pay off a lump sum award in installments within a reasonable time; (3) This option gives Sherry

immediate access to her share of retirement benefits as our Idaho law dictates; (4) Gerald does appear to have the ability to pay this sum without being compelled to retire; (5) This option clearly segregates the community interest from any separate interest Gerald might accrue following divorce; (6) it avoids the problem of significant fluctuations in present value which are caused by the application of different mortality tables and different discount rates; (7) It fairly places the risk of death before retirement upon the party who has made the decision to continue working.

23. Sherry has requested that Gerald be ordered to maintain survivor benefits in her favor and that she be permitted to share in any future cost of living increases. Although this court is not fully acquainted with survivor benefit options for military retirees, it does appear that Gerald may be eligible to make an election to purchase an annuity for Sherry under the Survivor Benefit Plan for the armed forces under 10 U.S.C.A. Section 1448. Such an election, if taken after retirement, would automatically reduce Gerald's retired pay by an amount equal to the cost of the annuity. In light of *Mansell v. Mansell*, and the way the USFSPA reads, it would appear that the intent of the statute is that just as disability income cannot be affected by local laws, the amount deducted for this type of annuity cannot as well. 10 U.S.C.S Section 1408(4)(D). I conclude that if Sherry desires to have this protection, she will have to bear the cost of the annuity. If the election can be exercised after 20 years of service but before actual retirement, the cost of the annuity would be paid by Gerald, but deducted from his payment of $739.55 to Sherry. After retirement, the amount paid directly to

Sherry under the USFSPA would be reduced by the cost of the annuity.

24. Sherry may request Gerald to make the election for such an annuity within 60 days of the entry of this Decree, or at any subsequent time that Gerald is permitted to make such an election under the provisions of the Survivor's Benefit Plan, 10 U.S.C.S. Section 1448.

25. After actual retirement, Sherry will be entitled to a percentage share of any cost of living increase awarded to Gerald. That percentage will be a fraction where the numerator is 254 months, which is the number of months of service accrued during the marriage, and the denominator is the total months of service at retirement. See *Utz v. Utz*, Ada County Case No. 13998-D, Findings of Fact and Conclusions of Law issued December 16th, 1991, pp.14-19.

26. Counsel for the plaintiff is requested to submit a proposed form of judgment which incorporates the relief awarded in this decision and the relief awarded upon the parties' stipulation.

It is so ORDERED this 13th day of November, 1992.

/s/ Michael Dennard
MICHAEL DENNARD
Magistrate

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

SHERRY MAY BALDERSON, Plaintiff/Respondent, vs. GERALD ELMER BALDERSON, Defendant/Appellant.	Case No. 11195-D MEMORANDUM DECISION AND ORDER

A Notice of Appeal was filed by the Defendant/Appellant on December 18, 1992 based upon the Judgment and Decree of Divorce entered in the above-entitled action on December 23, 1992 as well as the Findings of Fact and Conclusions of Law which formed the basis of the December 23rd Judgment.

A Notice of Cross Appeal was filed by the Plaintiff/Cross Appellant on February 8, 1993. Oral Argument was held on May 20, 1993 with both parties being represented by counsel. Based upon this Court's research and review as well as briefs submitted by both parties, this court hearing determines that the Judgment and Decree of Divorce entered December 28, 1992 based upon the Findings of Fact and Conclusions of Law entered November 13, 1992 is herein affirmed except to the extent that the Defendant/Appellant, Gerald Balderson, may at a later time petition the Magistrate Court in the event his disposable income is affected by any deductions allowed under 10 U.S.C.S. § 1408(a)(4).

On August 1, 1989 a Complaint was filed by Sherry May Balderson (Sherry) against Gerald Elmer Balderson (Gerald) for an order of divorce and division of property. Most of the property was divided by stipulation by the parties except for Gerald's military retirement. On August 26, 1992 at the time of the court trial the Magistrate was given the following information by Sherry and Gerald. They were married on August 20, 1970. Fifteen months prior to the marriage Gerald had been serving in the military. Other than a short period of time in the early 1970's, Gerald has always been in the military. Gerald testified that as of the date of the court hearing he had been on active duty in the military for twenty-two years and five months. While he would be eligible for retirement from the military with twenty years active service, he is contractually obligated to remain with the military until September of 1994. It is his desire to retire from the military when he has attained thirty years of military service. He will attain thirty years of military service eight years from the time of the court trial or approximately in the year 2000.

On November 13, 1992, the Magistrate entered his Findings of Fact and Conclusions of Law. The substantial portion of this document dealt with the disposition of the military retirement benefits earned by Gerald. The Magistrate determined that military retirement benefits, to the extent they are earned during marriage, are to be characterized as community property. The Court recognized that he was limited in treating only "disposable retired pay" as provided by 10 U.S.C.S. § 1408(c)(1). The Magistrate noted that Gerald had failed to present any evidence which would have modified the amount of "disposable

retired pay" to anything other than the gross monies he was entitled to. The Magistrate determined that based upon the time spent in the military while married compared with the amount spent in the military overall Sherry was entitled to receive the sum of $739.55 as her share of the retirement benefits. The Court ordered that the sum be initially paid to Sherry from Gerald until he retires at which time the sum will be paid directly to her by the military pursuant to 10 U.S.C.S. § 1408(d)(1). The Court also determined that if Sherry wishes to receive survivor benefits in her favor the monies for the purchase of the annuity for Sherry will be deducted from the payment of $739.55. Both parties appealed the order of the Magistrate. Gerald's Appeal centered around the division of the military retirement benefits while Sherry's Appeal questioned whether she should be required to bear the cost of the annuity and whether the fifteen months before marriage should be valued in terms of full military retirement.

The standard for appeal is well known. Absent an abuse of discretion a Magistrate's judgment granting divorce and dividing the community property will not be disturbed. Therefore, it is the burden of both Gerald and Sherry in their separate appeals to show that the Magistrate clearly abused his discretion. This Court determines that both parties have failed to meet their burden.

GERALD'S APPEAL

1. Overview of Interaction between Federal Law and Federal Preemption and State Law

Gerald Balderson was the Defendant in the Magistrate proceeding and is now the Appellant. The issues he raises on appeal are intertwined, but may be stated as follows:

1. The Magistrate didn't value Gerald's military retirement benefits correctly;

2. The Magistrate did not take into account what was Gerald's "disposable retired pay" which would be available for division; and

3. The Magistrate couldn't require Gerald to pay monies to Sherry before his retirement.

An overview of the status of military retirement benefits as they relate to Idaho divorce cases may be helpful in addressing the three issues brought by the Appellant.

The Idaho Supreme Court in the case of *Ramsey v. Ramsey,* 96 Id. 672, 535 P.2d 53(1975) determined that military retirement benefits was community property to the extent the retirement accrued during the marriage and could be divided upon a divorce. This was the state of Idaho law until the United States Supreme Court in *McCarty v. McCarty,* 453 U.S. 208, 101 S.Ct. 2728, 69 L.Ed. 2d 589(1981) held that military retirement benefits were for the benefit of the member of the armed services and therefore was not subject to division upon divorce. However, the *McCarty* court in its decision invited Congress to enact legislation in the event Congress disagreed with its decision.

The United States Congress quickly enacted 10 U.S.C.S. § 1408, commonly known as the Uniformed Services Former Spouses Protection Act (USFSPA). This section provided that

> Subject to the limitations of this section, a court may treat disposable retired or retainer pay payable to a member for pay periods beginning after June 25, 1991, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court.

10 U.S.C.S. § 1408(c)(1). The date, June 25, 1991, was the day before the United States Supreme Court decision of *McCarty v. McCarty,* supra was issued. The Uniformed Services Former Spouses Protection Act (USFSPA) contains three other provisions which are important to the case presently before this Court. These sections are: (1) A court cannot require a member of the armed services to apply for retirement or retire (10 U.S.C.S. § 1408(c)(3)); (2) The term "disposable retainer pay" is defined to include the total monthly retirement or retainer pay payable to a member minus certain deductions (10 U.S.C.S. § 1408(a)(4)); and (3) That a court order providing for the division of property from an armed services member shall be paid no later than ninety days after date of effective service on the secretary if the member is entitled to receive retired or retainer pay or if he is not entitled to receive retired or retainer pay at the time of the effective service of the court order then the payment shall begin no later than ninety days after the date the member first becomes entitled to retired or retainer pay (10 U.S.C.S. § 1408(d)(1)).

This Court has spent time setting forth specific provisions of 10 U.S.C.S. § 1408 as a result of the United States Supreme Court Decision of *Mansell v. Mansell,* 490 U.S. 581, 109 S.Ct. 2023, 104 L.Ed. 2d 675 (1989). This Court does not read the United States Supreme Court Decision of *Mansell v. Mansell,* with the majority opinion being authored by now deceased Justice Marshall, as broadly as the Appellant has. In the case of *Mansell v. Mansell,* supra, the question was whether or not the California Courts could include the disability monies received by the member in place of retirement benefits as a community property asset to be divided wherein the disability pay is specifically exempted under 10 U.S.C.S. § 1408(4). The United States Supreme Court determined where there is a plain and precise language of the statute, that language will preempt the state court's authority. As stated in the closing sections of the majority opinion

> We realize that reading the statute literally may inflict economic harm on many former spouses. But we decline to misread the statute in order to reach a sympathetic result when such a reading requires us to do violence to the plain language of the statute and to ignore much of the legislative history. Congress chose the language that requires us to decide as we do, and Congress is free to change it.

Mansell v. Mansell, 490 U.S. at 594, 104 L.2d [sic] at 689. This Court interprets the *Mansell,* supra, decision as prohibiting any state actions specifically preempted under 10 U.S.C.S. § 1408. As an aside since the enactment of USFSPA Idaho has consistently held that disability benefits of military retirees are not subject to division in divorce proceedings. See *Griggs v. Griggs,* 107 Id. 123, 686

P.2d 68 (1984); *Bewley v. Bewley*, 116 Id. 845, 780 P.2d 596 (1989); and *Desfosses v. Desfosses*, 120 Id. 354, 815 P.2d 1094 (1991).

2. The Magistrate has not erred in valuing the military retirement benefits or requiring payment prior to retirement

The issues of valuing Gerald's military retirement benefits may be quickly taken care of. In the Magistrate's Findings of Fact, the Court determined based upon Gerald's current pay grade in years of service he had a right to receive a monthly benefit of $1,566.45 had he chosen to retire. Based upon the years of service served during the marriage Sherry would be entitled to receive the sum of $739.55. Gerald was ordered to begin payment to Sherry immediately and upon his retirement the secretary pursuant to 10 U.S.C.S. § 1408(d)(1) would be required to began [sic] making the monthly payments to Sherry. Gerald complains of the valuation by the Magistrate. He points out that the valuation is a hybrid between a lump sum valuation and payments made by the employer, a feature of "as, if and when" distribution of the retirement benefits.

The Idaho case of *Shill v. Shill* (Shill II), 115 Id. 115, 765 P.2d 140 (1988) relied heavily on the Arizona case of *Koelsch v. Koelsch*, 713 P.2d 1234 (Ariz. 1986) which discussed non-employee spouses and their interest in a pension plan. As stated by the *Koelsch* court

> If the lump sum method would be impossible or inequitable, the court can order that the non-employee spouse be paid a monthly

> amount equal to his or her share of the benefit which would be received if the employee spouse were to retire. The community interest in the monthly payments would be calculated according to the same formula used for a lump sum payment. The monthly amount which would be available if the employee spouse were to retire is multiplied by a fraction in which the total months married while enrolled in the pension plan is the numerator and the total time in the pension plan up to the date of dissolution is the denominator. Each spouse would receive one half of the amount.
>
> Again, there are several payment alternatives, the choice of which depends on the equities of the individual case. If the employee spouse decides to retire, both shares can be paid directly to the beneficiaries by the retirement agency. If the employee spouse chooses not to retire, he or she would be liable to reimburse the non-employee spouse for the property interest in the monthly pension benefit that is precluded by the employee spouse's decision not to retire.

Koelsch, 713 P.2d at 1243. The Magistrate had authority based upon the Idaho case of *Shill II* as well as the Arizona case of *Koelsch*, supra, to value as well as to order payment even though Gerald has not yet retired. There has been no clear abuse of discretion by the Magistrate.

Neither the Uniformed Services Former Spouses Protection Act nor *Mansell* precludes the Magistrate from ordering immediate payment by Gerald of Sherry's interest in his military retirement benefits. Gerald is not being ordered to retire at this time. Furthermore, under 10 U.S.C.S. § 1408(e)(1) there is no preclusion from Gerald

making payments to Sherry prior to his retirement. It merely provides that upon effective service of the court order payment shall come from the secretary no later than ninety days after Gerald retires.

3. However, the [sic] Gerald will be entitled to present evidence at a later date in the event his "disposable retired or retainer pay" does not equal the total monthly retired pay to which he is entitled.

Gerald has made a valid point in that the Magistrate noted that there was no evidence before him that Gerald's "disposable retired or retainer pay" was anything less than the total monthly retired or retainer pay to which he would be entitled to if he had retired. No more than fifty percent of the disposable retired or retainer pay of the member may be paid out under 10 U.S.C.S. § 1408(d)(1). At the time of Gerald's retirement, there is a possibility that the sum of $739.55 may exceed fifty percent of his disposable retired or retainer pay. At that time then Gerald would have the right to address that question, assuming that the Uniformed Services Former Spouses Protection Act has not been amended in the interim. Therefore, to the extent that the Magistrate did not make any provision for allowing at a later time for Gerald to reopen the question of his "disposable retired or retainer pay". The Magistrate's Judgment and Decree is herein modified.

SHERRY'S APPEAL

1. The Magistrate Court did not err in requiring that the spouse pay her own annuity for protection under the survivor benefit plan.

As indicated within the various hearings, statutory provisions, and briefs received by this Court, a military retirement benefit terminates upon the death of the member. In an effort to avert a catastrophe in the event the member dies with a surviving dependant [sic], the member may elect to purchase an annuity on behalf of a dependant [sic]. The Magistrate has given Sherry the option to require Gerald to make such an election and to set up an annuity for her benefit. However, the Magistrate also requires that if Sherry does so elect to have such an annuity set up on her behalf then the funding for the annuity will come from the sum which the Court has ordered Gerald to make payment to her. Sherry is the beneficiary of the annuity and the Court determines that she should have the responsibility to shoulder the cost of such funding. Sherry claims this to be abuse of the Court's discretion.

In support of her position, Sherry cites the California case of *Ziegler v. Ziegler*, 207 Cal. App. 3d 788, 255 Cal. Rptr. 100 (1989). The facts in *Ziegler*, supra, differ substantially from the facts the issues facing the Magistrate. California has a specific provision which apparently requires if there is pre-existing insurance the obligor may be required to maintain the pre-existing protection. *Ziegler* had previously been funding an annuity on his

wife's behalf. Here, Sherry has the opportunity of requiring Gerald to set up an annuity with herself as the beneficiary. However, it is entirely up to Sherry to determine whether or not she wishes to fund an annuity with her portion of the community property. Therefore, the Magistrate Court has not clearly abused his discretion in requiring that if Sherry wishes to have an annuity set up that she shoulder the cost.

2. Pre-marital Service Should be Considered.

Her second argument is that Gerald's service of fifteen months prior to marriage does not have a value in terms of the military retirement benefits to which he is now entitled. Therefore, Sherry's argument goes, that the Magistrate should not have considered the fifteen months when calculating the community property interest in the military retirement benefits.

The fifteen months may not have a monetary value, but they were of value when calculating the twenty years before Gerald was eligible for retirement. As testified by Gerald in the court trial, he has been on active duty for twenty-two years and five months. Of that time, fifteen months he was single. Sherry has failed to carry her burden in showing that the Magistrate clearly abused his discretion in calculating a formula based upon the length of the marriage over the entire length of service until the time of the divorce. Under Idaho cases, the Court correctly determined the value of the retirement benefits. See *Ramsey,* supra, *Koelsch,* supra, and *Shill,* supra.

3. This Court declines to make an award of attorney fees.

Sherry has requested an award of attorney fees pursuant to I.C. § 32-704(2) based upon her financial resources. While this Court notes the financial resources of both parties prior to the divorce, this Court believes that the Magistrate has attempted to equally divide the community property between the parties and that there are sufficient financial resources for this Court to decline to make an award pursuant to I.C. § 32-704(2).

CONCLUSION

The standard to be met to reverse a judgment and decree of a Magistrate in a divorce proceedings is clear abuse of discretion. Neither party has met this burden except to the extent that the Magistrate decision will be modified to reflect that in the event the Appellant/Defendant, Gerald Elmer Balderson, at a later date is determined to have less than the sum of $739.55 as fifty percent of his "disposable retired or retainer pay", he will be entitled to petition the Magistrate Court for re-examination of its order. Other then [sic] this modification the Magistrate's decision is herein affirmed.

IT IS SO ORDERED.

Dated this 9th day of June, 1993.

/s/ Robert G. Newhouse
Robert G. Newhouse
District Judge

IN THE COURT OF APPEALS
OF THE STATE OF IDAHO

No. 20729

SHERRY MAY BALDERSON,	
Plaintiff-Respondent,	**1994 Opinion No. CA-31**
v.	**Filed: March 22, 1994**
GERALD ELMER BALDERSON,	**Frederick C. Lyon, Clerk**
Defendant-Appellant.	

Appeal from the District Court of the Fourth Judicial District, State of Idaho, Ada County. Hon. Robert G. Newhouse, District Judge. Hon. R. Michael Dennard, Magistrate.

Order of district court affirming magistrate's division of community property, *affirmed.*

Uranga, Uranga & Beiter, Boise, for appellant. Jean R. Uranga argued.

Wilson, Carnahan & McColl, Boise, for respondent. Debrha J. Carnahan argued.

PERRY, J.

Gerald Balderson appeals from a decision of the district court affirming the magistrate's order that he must begin paying his former wife $739.55 per month for her community interest in Gerald's military retirement benefits. We affirm.

FACTS AND PROCEDURE

Sherry and Gerald Balderson were married in 1970. Approximately fifteen months prior to their marriage, Gerald entered active duty in the Navy. In August of 1989, Sherry initiated divorce proceedings. Although the couple agreed to the division of most of their assets, they were unable to come to an agreement on the division of Gerald's military pension. At the time of the divorce, Gerald, though eligible for retirement, had not yet retired. The magistrate, however, ordered Gerald to begin paying Sherry $739.55 per month for her community property share of the retirement benefits Gerald would have received had he retired.

Gerald appealed to the district court, which affirmed the magistrate's decision with one exception. The district court ruled that the magistrate must allow Gerald the opportunity to reopen the case and introduce evidence of his actual "disposable retirement pay" under 10 U.S.C. § 1408(a)(4) when he does finally retire. This modification by the district court of the magistrate's order has not been challenged on appeal and, therefore, we do not review it.

Gerald appeals the remainder of the district court's decision, claiming that the magistrate's order violated 10 U.S.C. § 1408 and the Supremacy Clause of the United States Constitution, that the award was improper under Idaho law and that he should not be required to pay any portion of the retirement benefits until he actually retires. Finally, both parties seek attorney fees on appeal.

ANALYSIS

The central issue in this appeal is whether the order of the magistrate violates 10 U.S.C. § 1408. More specifically, we must determine whether the statute is violated when a court orders a member of the military to begin making payments to a former spouse of the former spouse's interest in the retirement benefits, even though the member has not yet retired. We conclude that the statute is not violated under these circumstances. Gerald also contends that the order in this case is not in accord with Idaho community property law. We conclude, however, that the order does comply with applicable state law.

A. THE SUPREMACY ISSUE

Gerald first claims that the magistrate's order violates the Supremacy Clause of the United States Constitution and therefore must be reversed. A question of supremacy and federal preemption is presented when state legislation or state common law is in conflict with federal statutes. State court orders may be struck down if they apply state law in a manner that violates federal statutes. For the matter at hand, a brief history of the legislation and case law in this area is instrumental to an understanding of the issue presented.

Prior to 1981, military retirement benefits which accrued during marriage while a couple resided in Idaho were considered community property and subject to division upon the divorce of the parties. *See e.g.* Ramsey v. Ramsey, 96 Idaho 672, 535 P.2d 53 (1975). In *Ramsey*, the Idaho Supreme Court concluded that state law, as it

affected military retirement benefits, was not preempted by then-existing federal case law and statutes.

In June of 1981, however, the United States Supreme Court decided McCarty v. McCarty, 453 U.S. 210 (1981). Finding that "application of community property law conflicts with the federal military retirement scheme," the Court ruled that federal law did, in fact, preempt state community property laws and that military retirement pay was not subject to division at divorce. *Id.* at 223. Justice Blackmun, writing for the majority, noted that if Congress saw fit to afford more protection to former spouses, it was free to do so, but that the Court was bound by the language of then-existing statutes. *Id.* at 235-36.

Congress acted on Justice Blackmun's invitation in 1982 when it enacted the Uniformed Services Former Spouses' Protection Act (USFSPA), which was expressly designed to defeat the effect of *McCarty*. *See* S. Rep. No. 97-502, 97th Cong., 2nd Sess. 1 (1982). The statute, now found at 10 U.S.C. § 1408, provides in part:

> **(c)(1)** Subject to the limitations of this section, a court may treat disposable retired or retainer pay payable to a member for pay periods beginning after June 25, 1981, [the date of the *McCarty* decision] either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court.

"Disposable retired or retainer pay" is defined in subsection (a)(4) as "the total monthly retired or retainer pay to which a member is entitled (other than the retired

pay of a member retired for disability under chapter 61 of this title) less [certain enumerated deductions]."

Following the enactment of the USFSPA, the Idaho Supreme Court reversed its decision in Rice v. Rice, 103 Idaho 85, 645 P.2d 319 (1982), which had been in accord with *McCarty*, and reinstated the holding of *Ramsey* that military retirement benefits were divisible community property. Griggs v. Griggs, 107 Idaho 123, 686 P.2d 68 (1984).

That federal law may preempt state law, including community property law, is not disputed here. Nor does either side dispute that when dealing with the pension of a retired military service member, the court may treat such retirement payments according to the community property laws of the state. In the case before us, the issue is whether the ordering of payments as if the member has retired, where the member could retire but has chosen not to, violates 10 U.S.C. § 1408. Gerald claims that subsection (c)(3) prohibits the type of order fashioned by the magistrate because it is an indirect order of retirement. That subsection states:

> (c)(3) This section does not authorize any court to order a member to apply for retirement or retire at a particular time in order to effectuate any payment under the section.

We first note that the issue before us, determining whether federal law prohibits the actions of a state court, is a question of law over which we have free review. Mundell v. Mundell, 124 Idaho 152, 153, 857 P.2d 631, 632 (1993). Also, on appeal from an order of the district court reviewing a determination made by a magistrate, we

examine the record independently, but with due regard for, the district court's intermediate appellate opinion. Wood v. Wood, 124 Idaho 12, 855 P.2d 473 (Ct. App. 1993); Haley v. Clinton, 123 Idaho 707, 851 P.2d 1003 (Ct. App. 1993).

The language of the USFSPA itself does not directly address the situation where a military member eligible for retirement has been ordered to make payments before actual retirement occurs. Prior to the passage of the act, however, the subcommittee considering the legislation heard testimony regarding this specific situation. *Uniformed Services Former Spouses' Protection Act: Hearings before the Subcommittee on Manpower and Personnel of the Committee on Armed Services*, 97th Cong., 1st and 2nd Sess., 70 (1982) (statement of Capt. Henry Palau); *Id.* at 184 (statement of Lt. Gen. Andrew P. Iosue). Nevertheless, language addressing the situation was not included in the statute. The drafters opted instead to simply prohibit the state court from ordering the military member to retire or to apply for retirement.

Other courts, most notably in California, have addressed this issue on a number of occasions and have reached conclusions that are wholly consistent with our decision today.

Prior to the passage of the USFSPA, the California Supreme Court decided In re Marriage of Gillmore, 629 P.2d 1 (Cal. 1981). In that case, the court found that "It is a 'settled principle that one spouse cannot, by invoking a condition wholly within his control, defeat the community interest of the other spouse.' " 629 P.2d at 4. The court further found, "A unilateral choice to postpone

retirement cannot be manipulated so as to impair a spouse's interest in those retirement benefits." *Id.* Although *Gillmore* did not deal specifically with military retirement benefits, its rationale was used in a number of cases that later did address such benefits following the passage of the USFSPA.

In 1984, a California court of appeals decided In re Marriage of Scott, 202 Cal.Rptr. 716 (Cal. Ct. App. 1984). Relying on the rationale of *Gillmore*, the court held that "an ex-spouse having a community interest in a matured military retirement may not be deprived of present use of that property because the service person finds it in his or her interest to remain on active duty." *Id.* at 717. Later that same year, another California court of appeals released the decision of In re Marriage of Jacobson, 207 Cal. Rptr. 512 (Cal. Ct. App. 1984). *Jacobson* is very similar to the case presently before us. The husband, who was in the Navy, was eligible to retire but elected not to. He was ordered to make monthly payments to the wife for her interest in the retirement benefits. In affirming this distribution, the court of appeals rejected the husband's argument that the order to make payments before actual retirement violated 10 U.S.C. §1408(c)(3).

We agree with the rationale of *Gillmore* and the holdings of *Scott* and *Jacobson*. Members of the armed services should be free to retire as they choose, but such a decision should not be permitted to adversely affect the property rights of the service member's former spouse.

Gerald argues that the California cases relied on above are not controlling because of the United States Supreme Court's decision in Mansell v. Mansell, 490 U.S.

581 (1989). The Court in *Mansell* determined that military retirement pay which was waived by the member in order for the member to collect disability pay should not be included in the determination of the community's interest in the pension. The USFSPA, in subsection (a)(4), specifically excludes disability retirement pay from the definition of "disposable retired or retainer pay." We agree with Gerald that the *Mansell* decision indicates that there is still some degree of preemption remaining after the passage of the USFSPA and that the authority granted to state courts over military retirement benefits is not absolute. *See* 490 U.S. at 590-92. This fact alone, however, does not change our analysis.

The USFSPA grants to the states broad authority over military retirement benefits. Subsection (c) then provides a number of limitations on that authority. The question before us is whether one of those limitations, specifically (c)(3), covers the situation at hand. Without specific language in the statute or legislative history to guide us as to the intent of Congress on this issue, we must ascertain Congress' intent from the language included in the statute and from the overall purpose of the statute.

It is clear that Congress had a dual purpose in passing the USFSPA. Defeating the harsh effects of *McCarty* and protecting the military spouse were obvious goals, as evidenced by the legislative history. "[T]he committee believes that the unique status of the military spouse and that spouse's great contribution to our defense require that the status of the military spouse be acknowledged, supported and protected." S.Rep.No. 97-502, 97th Cong., 2nd Sess. 6 (1982). Likewise, as evidenced by subsection

(c)(3) and other testimony before the subcommittee considering the bill, there was also a great concern over a service member's freedom of choosing when to retire. We believe that ordering a member to begin making payments before actual retirement addresses both concerns. The nonmember spouse's community interest is protected while the member spouse is not forced to retire.

We have reviewed cases from other courts, including the Supreme Court of New Mexico, which recently reversed a New Mexico Court of Appeals decision which had rejected the *Gillmore* and *Jacobson* approach. *See* Ruggles v. Ruggles, 860 P.2d 182 (N.M. 1993) *overruling* Ruggles v. Ruggles, 834 P.2d 940 (N.M.App. 1992). We believe the position ultimately adopted by New Mexico and California is the majority position. Having read these cases from other jurisdictions and reviewed the legislative history of the USFSPA, we conclude that subsection (c)(3) should not be applied to prohibit the type of order fashioned by the magistrate in this case. The decision by the United States Supreme Court in *Mansell* is not inconsistent with this conclusion.

B. CURRENT IDAHO LAW

Gerald argues that even if the magistrate's order did not violate federal law, it was error under existing Idaho law. We disagree.

We first note that when reviewing the magistrate's decision, we employ an abuse of discretion standard. "The disposition of community property is left to the discretion of the trial court, and unless there is evidence in the record to show an abuse of that discretion, the

award of the trial court will not be disturbed." Koontz v. Koontz, 101 Idaho 51, 52, 607 P.2d 1325, 1326 (1980).

Gerald argues that the magistrate was limited to two theories of distribution for Sherry's interest in the retirement benefits, either a current valuation and "lump sum" payment method at the time of divorce or the "as if and when" method, which values and divides the benefits as of the date of divorce, but provides for payment of the nonemployee spouse's share only after benefits have begun to be received upon the retirement of the employee spouse. Although we recognize that these two methods generally are the preferred ways to divide retirement benefits, we do not accept that they are the only methods available.

It is well-settled that trial courts have broad discretion in making awards of marital property in divorce proceedings. Maslen v. Maslen, 121 Idaho 85, 90, 822 P.2d 982, 987 (1991); Shill v. Shill, 115 Idaho 115, 765 P.2d 140 (1988); Koontz v. Koontz, 101 Idaho 51, 607 P.2d 1325, (1980); Hooker v. Hooker, 95 Idaho 518, 511 P.2d 800 (1973). The Idaho Supreme Court has recently acknowledged that a case-by-case approach is the only practical and equitable approach to dividing retirement benefits.

> Because the provisions of retirement plans vary so greatly from plan to plan, both in the manner of funding and also in the administration of plans, and because the circumstances in each case are so varied, we decline to state a single inflexible rule for calculating the community interest or value of retirement plans. *See Rogers & Rogers*, 45 Or.App. 885, 609 P.2d 877 (1980). "For all of these reasons, it appears to us

> to be impractical – if not impossible – to formulate a categorical rule about the appropriate treatment of retirement accounts in dissolution of marriage cases. Because there are so many variables, individual cases will have to be largely decided on their facts." 609 P.2d 877 at 881. We conclude that it is a better policy to allow the trial court sufficient discretion to consider the circumstances in each case to determine the most equitable manner for determining and dividing the marital portion of pension benefits. *Shill v. Shill*, 115 Idaho 115, 765 P.2d 140 (1988).

Maslen v. Maslen, 121 Idaho 85, 91, 822 P.2d 982, 988 (1991).

In the case before us, the magistrate based his decision on the following factors:

> (1) [T]here is not enough other community property to make a lump sum, offsetting award of other property to Sherry; (2) Gerald's income is limited and it would not appear to be feasible that he could pay off a lump sum award in installments within a reasonable time; (3) This option gives Sherry immediate access to her share of retirement benefits as our Idaho law dictates; (4) Gerald does appear to have the ability to pay this sum without being compelled to retire; . . . (7) It fairly places the risk of death before retirement upon the party who has made the decision to continue working.

With these considerations in mind, neither a lump sum payment nor an "as if and when" approach was feasible in this case. Gerald was unable to pay the lump sum, and forcing Sherry to wait until Gerald retired would deny

her immediate access to her community property interest while subjecting that interest to the risk of defeasance due to Gerald's death.

In fashioning this distribution plan, the magistrate relied heavily on Koelsch v. Koelsch, 713 P.2d 1234 (Ariz. 1986). In *Koelsch*, the Arizona Supreme Court wrestled with many of the same problems as those confronting the magistrate in the instant case. In *Koelsch*, the court found:

> If the lump sum method would be impossible or inequitable, the court can order that the non-employee spouse be paid a monthly amount equal to his or her share of the benefit which would be received if the employee spouse were to retire. . . .
>
> Again, there are several payment alternatives, the choice of which depends on the equities of the individual case. If the employee spouse decides to retire, both shares can be paid directly to the beneficiaries by the retirement agency. If the employee spouse chooses not to retire, he or she would be liable to reimburse the non-employee spouse for the property interest in the monthly pension benefit that is precluded by the employee spouse's decision not to retire.

Id. at 1243.

We agree with the reasoning in *Koelsch*. When there is no feasible way to immediately distribute the marital property, and the circumstances dictate against installment payments on a lump sum, the court may order payments of the retirement benefits as if the employee spouse had retired. If there is no appropriate mechanism for the employer or retirement system to begin making

the payments, the employee spouse may be required to do so individually.

Given the circumstances of this case, we conclude that the magistrate did not abuse its discretion in arriving at the award. The award was neither prohibited by 10 U.S.C. § 1408 nor contrary to existing Idaho law.

C. ATTORNEY FEES

Both sides have requested attorney fees on this appeal, Gerald under I.C. § 12-121 and Sherry under I.C. § 32-704(2). We decline to make such an award to either party under the facts of this case.

CONCLUSION

The order of the magistrate does not violate 10 U.S.C. § 1408(c)(3), nor is it otherwise prohibited by the USFSPA. Under the current state of the case law in Idaho, the magistrate had broad discretion in fashioning an award for the parties in this case. The final award did not constitute an abuse of that discretion and we therefore affirm the award. Neither party is awarded attorney fees; however, as the prevailing party, the respondent is awarded costs. I.A.R. 40.

WALTERS, C.J., and LANSING, J., concur.

IN THE SUPREME COURT OF THE STATE OF IDAHO
DOCKET NO. 21354

SHERRY MAY BALDERSON,	**Boise, September 1994 Term**
Plaintiff-Respondent	**1995 Opinion No. 45**
vs.	
GERALD ELMER BALDERSON,	**Filed: May 22, 1995**
Defendant-Appeilant.	**Frederick C. Lyon, Clerk**

Appeal from the District Court of the Fourth Judicial District of the State of Idaho, in and for Ada County. Hon. Robert G. Newhouse, District Judge; Hon. Michael Dennard, Magistrate Judge.

Appeal from the magistrate court's valuation of military retirement benefits upon divorce and the court's distribution of a sum equal to one-half the community interest in the benefits. *Affirmed* in part, *Vacated* in part, and *Remanded*.

Uranga, Uranga & Beiter, Boise, for appellant. Jean R. Uranga argued.

Wilson, Carnahan & McColl, Boise, for respondent. Debrha J. Carnahan argued.

McDEVITT, C.J.

I.

BACKGROUND AND PROCEDURE

Gerald and Sherry Balderson were married on August 20, 1970. Gerald entered active duty in the Navy

on May 20, 1969, fifteen (15) months prior to his marriage to Sherry. Gerald left the Navy for a short time in 1973, but re-enlisted for active duty in 1974. The decision to re-enlist was made by both parties with the understanding that the Navy would be Gerald's career. Gerald has been on active duty in the Navy since re-enlisting in 1974. Under Gerald's re-enlistment contract, he would receive a promotion and, in return, Gerald would forego retirement until September 1994. Even though Gerald was eligible for retirement in 1994, he chose to remain in the military until he had completed 30 years of active duty. Gerald will attain 30 years of service in the year 2000, approximately eight years from the time of divorce, and he intends to retire at that time.

In August of 1989, Sherry initiated divorce proceedings. At the date of trial, Gerald had been on active duty for twenty-two (22) years and five (5) months, or 269 months. Not including the fifteen months of duty prior to marriage, Gerald was on active duty for a total of 254 months during marriage. In the divorce, there was no dispute as to the character, value, and division of all community property, with the exception of the community interest in Gerald's military retirement benefits. Sherry sought one half of Gerald's military retirement pension earned during marriage.

The magistrate court valued the community interest in the military retirement benefits at $1,479.10 per month. This amount was based on Gerald's time spent in the military during marriage as compared to his total time of service as of the date of divorce. The magistrate court then ordered Gerald to pay Sherry in installments a sum equal to her one-half interest in the benefits, $739.55 per

month. The magistrate court awarded the benefits to be paid in installments because there were insufficient assets to make an offsetting lump sum award to Sherry and because this award effectively gave Sherry immediate control over her community share in the retirement benefits without compelling Gerald to retire.

Gerald appealed the decision of the magistrate court which was affirmed by the district court. The district court modified the magistrate court's decision to permit Gerald to petition the magistrate court for re-examination of its order if it is determined that $739.55 equals more than fifty percent of his monthly "disposable retired or retainer pay" under the Uniform Services Former Spouses Protection Act (USFSPA), 10 U.S.C. § 1408(e)(1).

Gerald then appealed the district court's ruling. The Court of Appeals agreed with the district court's ruling and affirmed the magistrate court's decision as amended. Gerald then petitioned this Court for a review of the Court of Appeal's decision. On review Gerald argues that the Supremacy Clause of the United States Constitution precluded the magistrate court from ordering Gerald to begin making immediate payments to Sherry for her interest in Gerald's military retirement benefits under 10 U.S.C. § 1408(c)(3). Gerald also argues that the magistrate court erred by failing to order payment of Sherry's share of the retirement benefits not commence until Gerald retired. Gerald argues that the retirement benefits should be valued at the time Gerald actually retires rather that at the time of divorce. Both parties seek attorney's fees on appeal.

This Court affirms in part, vacates in part, and remands this case to the magistrate court.

II.

PREEMPTION ISSUE

When this Court reviews issues first decided in the magistrate court, which are then presented to the district court on appeal, this Court reviews the magistrate court's decision independently of, but with due regard for, the district court's appellate decision. *Ireland v. Ireland*, 123 Idaho 955, 957-58, 855 P.2d 40, 42-43 (1993). This Court will uphold the findings of the magistrate court if the findings are supported by substantial and competent evidence. *McNelis v. McNelis*, 119 Idaho 349, 351, 806 P.2d 442, 444 (1991). However, issues of law are freely reviewed by this Court. *In re Mundell*, 124 Idaho 152, 153, 857 P.2d 631, 632 (1993).

Because the magistrate court ordered a distribution of the sum equal to Sherry's interest in the military retirement benefits, rather than distributing the pension benefits themselves, we hold that the magistrate court did not err in concluding that Idaho law was not preempted by 10 U.S.C. § 1408(c)(3).

The Uniform Services Former Spouses Protection Act (USFSPA) gives courts the authority to treat disposable military retired or retainer pay as community property in accordance with the laws of the court's jurisdiction, subject to specific limitations in the Act. 10 U.S.C. § 1408(c)(1). The USFSPA's limits on state courts which

are relevant to this proceeding are (1) that only disposable retirement income may be considered as community property, (2) that a court may not order a military member to retire in order to effectuate a payment of retirement benefits, and (3) that no more than fifty percent of the disposable retired or retainer pay may be paid out. 10 U.S.C. §§ 1408(c)(1), (c)(3), (d)(1). There is no authority in the Act for a court to order direct payments of the military retirement benefits before actual retirement. The magistrate court's order recognized this, and instead of awarding Sherry an interest in the pension benefits, which the court could not do, it awarded Sherry the value of a sum equal to her interest in the pension benefits.

The magistrate court is not precluded by the USFSPA from valuing the community property interest in the benefits and distributing the other assets of the community to account for the value of the benefits. Pursuant to this authority, the magistrate court calculated the value of the community interest in the retirement benefits and the value of Sherry's one-half interest in the benefits. The magistrate court then awarded Sherry an amount equal to her interest in the retirement benefits.

The magistrate court did not exceed its grant of authority under the USFSPA because it only valued the military retirement benefits under community property principles and did not divide or distribute the actual pension benefits at the time of divorce. The magistrate court also did not interfere with the purposes of the USFSPA to allow for the distribution of military retirement benefits under community property laws.

We affirm the decision of the magistrate court to the extent that the magistrate court only assessed the value of the military retirement benefits under Idaho community property law.

III.

VALUATION AND DISTRIBUTION ISSUES

The next issue which must be addressed is whether the magistrate court properly valued and distributed the disputed community assets. The trial court has sufficient discretion to consider the circumstances of each case and decide the most equitable manner for valuing and dividing the marital portion of pension benefits. *Maslen v. Maslen*, 121 Idaho 85, 91, 822 P.2d 982, 988 (1991). In reviewing the magistrate court's disposition of community property, this Court will not disturb the disposition unless there is evidence of an abuse of discretion. *Koontz v. Koontz*, 101 Idaho 51, 52, 607 P.2d 1325, 1326 (1980); *see also Olsen v. Olsen*, 125 Idaho 603, 606, 873 P.2d 857, 860 (1994) (vacating and remanding the decision of the trial court where it applied the inappropriate rates to capitalize excess earnings and to discount for marketability in determining the value of the marital interest in the closely held corporation).

A. VALUATION

This Court has recognized different methods of valuing pension plans, such as the time rule method and the accrued benefit method. *Maslen*, 121 Idaho at 89-90, 822 P.2d at 986-87. Because retirement benefit plans are so

varied in their provisions, funding, and administration, valuation cases are to be decided on an individual basis. *Id.* at 91, 822 P.2d at 988; *Shill v. Shill*, 115 Idaho 115, 120, 765 P.2d 140, 145 (1988) (*Shill II*). The benefits should be valued at the time of divorce, because benefits acquired after the divorce are the separate property of the employee spouse. *Id.*

The magistrate court was within its discretion to determine the method of distribution of community assets, and we will not disturb this magistrate court's installment method of distribution of the Baldersons' community assets. However, in applying this method of distribution, the valuation of the community interest in the retirement benefits requires a discounting of the benefits to their present day value as of the date of divorce. If the benefits are not discounted to their present value, the value assessment does not accurately reflect the non-employee spouse's actual interest in the benefits, and the value of the benefits can be inflated, resulting in an inequitable distribution of the assets.

The magistrate court calculated the community interest in the disposable military retirement benefits as being the amount Gerald would receive as of the date of divorce based on his date of divorce income and his time spent in active service during the marriage, or $1,479.10 per month.[1] Sherry's interest in the benefits was determined to be one-half of the community interest, or

---

[1] The magistrate court in calculating the amount of retirement benefits Gerald was to receive, multiplied his total number of years in the service as of the date of divorce by his pay grade at the date of divorce. (2.5% (the percentage of pay Gerald would receive) X $2829.90 (Gerald's pay grade at divorce) X 22

$739.55 per month. The magistrate court properly considered the benefits that were earned during the marriage in its valuation of the community interest in the retirement benefits, but it failed to calculate the present value of those benefits by calculating the lump sum future value of Gerald's retirement benefits and discounting that sum to its present-day value prior to determining the value of Sherry's interest in the benefits and distributing the assets.

B. DISTRIBUTION

Under I.C. § 32-712(1)(a), the trial court has the power to distribute community property in an equitable manner unless there are compelling reasons to distribute the property otherwise. The general rule is that the trial court should, if possible, order the disposition of the community property upon divorce to give each spouse sole and immediate control of his or her determined share. *Maslen v. Maslen*, 121 Idaho 85, 92, 822 P.2d 982, 989 (1991). However this rule must be applied within the confines of Idaho's statutes which delineate separate and community property interests. I.C. §§ 32-903, 32-906; *Shill II*, 115 Idaho 115, 118, 765 P.2d 140, 143 (1988); *Maslen*, 121 Idaho at 94, 822 P.2d at 991 (McDevitt, J. concurring in the result).

---

years (rounded off duration of active service) = $1,556.45.) The community portion of this amount was calculated to be $1,479.10 ($1,556.45 X 254/269 (number of months in service during marriage/total number of months in service.))

In *Shill v. Shill*, 100 Idaho 433, 599 P.2d 1004 (1979) (*Shill I*), this Court recognized two possible methods for dividing a pension plan: "[o]ne is to award the employee the pension and assign the non-employee-spouse assets of a value equal to the present value of the contingent benefits." (the "lump sum" method) "The other method of dividing the rights is to reserve jurisdiction until retirement and divide the actual monetary benefit when received." (the "as if, and when" method) *Id.* at 437, 599 P.2d at 1008. However, in situations like the present one, where the largest marital asset is the retirement benefit and an inequitable division of the pension benefits would result from using either of the first two methods, this Court has recognized another method of dividing the assets. *Beesley v. Beesley*, 114 Idaho 536, 541-42, 758 P.2d 695, 702-03 (1988). This method of distributing the benefits allows a court to make an award of installment payments in lieu of a lump sum award. *Id.* When an award is made under the installment method, the interest accruing on the award at the rate used to discount the retirement benefits to their present value is to be awarded to the recipient spouse. *Id.*

Although a lump sum award is the preferred method of distribution, the magistrate court was within its discretion to consider the circumstances of this case and to decide that the lump sum method paid in installments was the most equitable manner for valuing and dividing the marital portion of pension benefits. *Maslen*, 121 Idaho at 91, 822 P.2d at 988. The magistrate court's method of distribution of a determined lump sum in installments gave Sherry immediate control of a sum equal to her determined share of the benefits paid out over time.

Insufficient property was available to make an offsetting award equal to the value of the retirement benefits, and the other methods of distribution would have resulted in an inequitable division of the retirement benefits.

This distribution method is in accord with Idaho's case law and furthers the policies of separating the parties' interests in the property. The parties have immediate control over their interest in the community property and a lesser risk to future expectations of a contingent interest in the retirement benefits.

The magistrate court did not abuse its discretion in ordering Gerald to begin making immediate payments to Sherry of an amount equal to her interest in the military retirement benefits. However, the magistrate court did not correctly calculate the interest to which Sherry is entitled. Because Sherry was awarded a sum equal to her interest in the retirement benefits to be paid in installments, she is entitled to interest accrued at the rate used to discount the retirement benefits to their present value. *Beesley*, 114 Idaho at 541, 758 P.2d at 702.

The decision of the magistrate court is vacated to the extent that it failed to discount the community interest in the retirement benefits to their present day value and remanded for a calculation of the present day value of the community interest in the retirement benefits for purposes of distributing to Sherry a sum equal to one-half that value. Also on remand the magistrate court is to calculate the interest on the installment payments to which Sherry is entitled.

IV.

ATTORNEY'S FEES

Both parties request attorney's fees on appeal. Gerald requests attorney fees pursuant to I.C. § 12-121. Idaho Code § 12-121 provides that a judge may award reasonable attorney's fees in any civil action to the prevailing party. Generally reasonable attorney's fees will only be awarded to the prevailing party under I.C. § 12-121 when the court is left with the "abiding belief that the appeal was brought, pursued or defended frivolously, unreasonably and without foundation." *Minich v. Gem State Developers, Inc.*, 99 Idaho 911, 918, 591 P.2d 1078, 1085 (1979). There is no basis in the record that Sherry defended the suit frivolously, unreasonably and without foundation. No attorney's fees are awarded to Gerald.

Sherry requests attorney fees pursuant to I.C. § 32-704. Idaho Code § 32-704(3) provides that a court may consider the financial resources of both parties and the factors set forth in I.C. § 32-705 to determine whether a party is entitled to an award of attorney fees. *Ireland v. Ireland*, 123 Idaho 955, 960, 855 P.2d 40, 45 (1993). In considering Sherry's financial resources, this Court holds that she has sufficient financial resources and declines to enter an order requiring Gerald to pay Sherry's fees.

V.

CONCLUSION

The decision of the magistrate court is affirmed in part, vacated in part and remanded for further proceedings consistent with this opinion. Costs to Appellant.

Justices TROUT, SILAK, and Justice Pro Tem Reinhardt, **CONCUR.**

JOHNSON, Justice, **dissenting.**

I respectfully dissent. In my view, the magistrate judge's order requiring Gerald to begin making immediate payments to Sherry for her interest in Gerald's military retirement benefits violates the Supremacy Clause of the U.S. Constitution because 10 U.S.C. § 1408(c)(3) and other provisions of USFSPA preempt the judge's authority to do so.

(2)

Supreme Court, U.S.
FILED
AUG 15 1995
CLERK

No. 95-81

In The

Supreme Court of the United States

October Term, 1995

GERALD ELMER BALDERSON,

Petitioner,

v.

SHERRY MAE BALDERSON,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of The United States

RESPONDENT'S BRIEF IN OPPOSITION

DEBRHA JO CARNAHAN
FRANCES R. STERN
WILSON, CARNAHAN & MCCOLL
P.O. Box 1544
Boise, Idaho 83701
(208) 345-9100
(208) 384-0442 (Fax)

Attorneys for Respondent, Sherry Mae Balderson

August 15, 1995

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

44 pp

QUESTION PRESENTED

Did the Idaho Supreme Court properly affirm the lower courts by ruling that the Supremacy Clause of the United States Constitution and 10 U.S.C. 1408(c)(3) did not prevent the trial court from ordering a military member to begin making immediate payments to his ex-wife for her community interest in his retirement benefits before he retires when he had chosen to take an extended retirement date?

PARTIES TO THE PROCEEDING

The parties to the proceeding in this Court are individuals who were formally married.

TABLE OF CONTENTS

Page

Question Presented i

Parties to the Proceeding ii

Table of Contents iii

Table of Authorities iv

Opinions Below 1

Federal Constitutional Provisions and Statutes Involved 2

Statement of the Case 2

Reasons for Denying the Writ 3

I. There is no issue of preemption in this case 4

A. Present payments do not affect Gerald's Pension 4

B. State law is not preempted in the matter of timing of property division payments 5

II. If federal retirement law has been preempted, the authority to decide all issues in the appeal would be returned to the states 7

III. The U.S. Court has long recognized that domestic relations are preeminently matters of State law 8

Conclusion 10

Appendix 1a

TABLE OF AUTHORITIES

Page

CASES:

Blum v. Stenson, 466 U.S. 866, 896 (1984) 5

Consumer Product Safety Commission v. GTE Sylvania, Inc., 477 U.S. 102, 108 (1980) 5

Griggs v. Griggs, 107 Idaho 123, 686 P.2d 68 (1984) 4

Hisquierdo v. Hisquierdo, 439 U.S. 572, 581 (1978)....8, 9

Mansell v. Mansell, 490 U.S. 581, 587 (1989)....5, 6, 8, 9

McCarty v. McCarty, 453 U.S. 219 (1981).....3, 7

Ramsey v. Ramsey, 96 Idaho 672, 535 P.2d 53 (1975) 3

Rose v. Rose, 481 U.S. 619 628 (1987) 9

Whetmore v. Markoe, 196 U.S. 68, 77 (1904)..... 9

UNITED STATES CODE SECTIONS:

10 U.S.C. Section 1408 .....3, 5, 6, 7, 10

10 U.S.C. Section 1408(a)(4) 3, 5

10 U.S.C. Section 1408(a)(4)(b) 6

10 U.S.C. Section 1408(a)(4)(6) 6

10 U.S.C. Section 1408(c)(1) 7

10 U.S.C. Section 1408(c)(3) 2, 3, 4, 5, 6, 7

10 U.S.C. Section 1408(d)(1)..... 8

10 U.S.C. Section 1408(4)..... 8

CONSTITUTION OF THE UNITED STATES:

Article 6, Clause 2..... 2

No. _____

In The

Supreme Court of the United States

October Term, 1995

GERALD ELMER BALDERSON,

Petitioner,

v.

SHERRY MAE BALDERSON,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of The United States

RESPONDENT'S BRIEF IN OPPOSITION

OPINIONS BELOW

The Judgment and Decree of Divorce in this case, along with Findings of Fact and Conclusions of Law of the Magistrate Court of the Fourth Judicial District of the State of Idaho, was entered December 28, 1992. The Memorandum Decision and Order on appeal to the District Court of the State of Idaho was entered June 9, 1993. The opinion of the Idaho Court of Appeals was entered March 22, 1994, and the opinion of the Idaho Supreme Court was entered on May 22, 1995.

FEDERAL CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Federal Constitutional provision involved in this case is the Supremacy Clause found in Article 6, Clause 2, of the United States Constitution.

The Federal statute involved is 10 U.S.C. § 1408.

STATEMENT OF THE CASE

Respondent agrees with Petitioner's statement of the facts and points out that Idaho Law requires the non-employee's share of any retirement be valued at the time of divorce. Since this value is fixed at the time of divorce (i.e. Sherry Balderson will receive $739.55 per month which amount does not increase) (Findings of Fact and Conclusions of Law, Appendix A, 3a, ¶ 10), it is inequitable to require her to wait many years and begin receiving this fixed amount only when her ex-husband decides, in his sole discretion to retire. Since, under Idaho law, the monthly payment amount must be fixed, while the employee spouse receives all benefit of the pension's post divorce increases, the Idaho Courts have required the payments to begin immediately. In this way, Gerald's federal statutory right not to be forced to retire can be balanced with Sherry's equitable right to receive the full present value of her interest in the community property military retirement. Findings of Fact and Conclusions of Law, Appendix A, 13a, ¶ 22.

REASONS FOR DENYING THE WRIT

The Idaho Supreme Court properly affirmed the lower courts by ruling that the Supremacy Clause of the United States Constitution and 10 U.S.C. 1408(c)(3) did not prevent the trial court from ordering a military member to begin making immediate payments to his ex-wife for her community interest in his retirement benefits when he had chosen to take an extended retirement date.

Prior to 1981, military retirement benefits accruing during marriage while the parties were domiciled within a community property state were considered community property for division upon divorce. *See Ramsey v. Ramsey*, 96 Idaho 672, 535 P.2d 53 (1975).

On June 21, 1981, however, the United States Supreme Court issued the decision of *McCarty v. McCarty*, 453 U.S. 219 (1981). *McCarty* held that Federal law preempted state law in that military retirement benefits were not subject to division under state community property laws but were the separate property of the military spouse. The United States Congress directly responded to the *McCarty* decision by enacting the Uniform Services Former Spouses' Protection Act (USFSPA), 10 U.S.C. Section 1408, *et. seq.* The Act became effective February of 1983, and provides that State law determines the character of "disposable" retirement military pay as community property or as separate property.

10 U.S.C. Section 1408 gives state courts the right to treat disposable retired or retainer pay as community property, subject to certain limitations. Section 1408(a)(4) defines disposable or retainer pay as:

> The total monthly retired or retained pay to which a member is *entitled* (other than the retired pay of a member retired for disability in a chapter 61 of this title).
>
> (Emphasis added.)
>
> 10 U.S.C. 1408(a)(4).

Free to once again apply Idaho state law to military retirement benefits, the Idaho Supreme Court in the case of *Griggs v. Griggs*, 107 Idaho 123, 686 P.2d 68 (1984), unequivocally stated that military retirement benefits, accruing during the marriage while the parties are domiciled in a state permitting the division of such benefits, would be community property. Given the authority for the Idaho Court to apply its community property law to military retirement benefits, Petitioner's contention that USFSPA precluded the Court from valuing and dividing his military retirement benefits while he remains on active duty is misplaced.

I. THERE IS NO ISSUE OF PREEMPTION IN THIS CASE.

A. Present payments do not affect Gerald's pension.

As the Idaho Supreme Court pointed out:

> Because the magistrate court ordered a distribution of the sum equal to Sherry's interest in the military retirement benefits, rather than distributing the pension benefits themselves, we hold that the magistrate court did not err in concluding that Idaho Law was not preempted by 10 U.S.C. § 1408(c)(3).

Opinion of Id. Sup. Ct., Appendix B, page 7b

The payments which Gerald is required to pay prior to his retirement are not payments from his military pension.

B. State law is not preempted in the matter of timing of property division payments.

§ 1408 does not preempt state law on the issue before this Court. "Where, as here, the question is one of statutory construction, we begin with the language of the statute." *Mansell v. Mansell*, 490 U.S. 581, 587 (1989); *see e.g. Blum v. Stenson*, 466 U.S. 866, 896 (1984); *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 477 U.S. 102, 108 (1980). There is no language in Section 1408 which precludes the action of the Magistrate Court in this case. The definition of disposable retired pay is pay to which a military member is entitled. (Section 1408(a)(4)). Petitioner was entitled at the time of the Court's action to retirement pay. He could have retired at twenty years, yet voluntarily chose to continue in service until the year 2000. There is no language in the statute requiring that the military member must be receiving the pay he is entitled to before being required to make payments in a community property division. Further, the Court's action in no way forced Petitioner to retire, which would have been in violation of Section 1408(c)(3). That Section provides that:

> This Section does not authorize any court to order a member to apply for retirement or retire at a particular time in order to effectuate any payment under this Section.

10 U.S.C. Section 1408(c)(3).

He continues to be an active member in the military to this day. The Court's action did not involve forcing Petitioner to retire or apply to retire.

Petitioner has contended that the Idaho court order violates 10 U.S.C. Section 1408(c)(3) and the Supremacy Clause because the trial court was trying to indirectly do what it could not do directly. This is simply not the case. The Court's action did not directly or indirectly force Petitioner into retirement, or to apply for retirement. The decision simply recognized that fact that Petitioner could have retired and received benefits, but had chosen not to. Its actions protected the interest of Respondent, and in no way violated Section 1408.

Petitioner has erroneously relied on the Supreme Court's decision in *Mansell v. Mansell, supra,* to support his position. This situation is, however, unlike the situation in *Mansell*. In that case, the holding was specifically directed to military disability payments under Section 1408(a)(4)(b). That subsection specifically states that disposable retired pay does not include any monies that must be waived in order to receive compensation under Title 5 or Title 38. 10 U.S.C. Section 1408(a)(4)(6). In order to receive disability payments, the military member must waive an equal portion of his retirement pay. *Mansell*, at 583. The Supreme Court in *Mansell* relied on a specific directive from Congress in excluding military disability pay from community property division. There is no such directive in this case.

II. IF FEDERAL RETIREMENT LAW PREEMPTED STATE RETIREMENT LAW, THE AUTHORITY TO DECIDE ALL ISSUES IN THIS APPEAL HAS BEEN RETURNED TO THE STATES BY THE UNIFORMED SERVICES FORMER SPOUSES PROTECTION ACT (USFSPA).

If the USFSPA did preempt state law in the issue of military retirement, the authority to divide the pension has been returned to the states by the plain language of the statute. 10 U.S.C.

§ 1408 provides:

> Subject to the limitations of this section, a court may treat disposable retired or retainer pay payable to a member for pay periods beginning after June 25, 1991, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court.

The Idaho District Court, in its decision in this case, recognized that only plain and precise language would preempt a state court's authority:

> 10 U.S.C. § 1408(c)(1). The date, June 25, 1991, was the day before the United States Supreme Court decision of *McCarty v. McCarty, supra*, was issued. The Uniformed Services Former Spouses Protection Act (USFSPA) contains three other provisions which are important to the case presently before this Court. These sections are: (1) A court cannot require a member of the armed services to apply for retirement or retire (10 U.S.C. § 1408(c)(3)); (2) The term "disposable retainer pay" is defined to include the total monthly retirement or retainer pay payable to a

member minus certain deductions (10 U.S.C. § 1408(a)(4)); and (3) That a court order providing for the division of property from an armed services member shall be paid no later than ninety days after date of effective service on the secretary if the member is entitled to receive retired or retainer pay or if he is not entitled to receive retired or retainer pay at the time of the effective service of the court order then the payment shall begin no later than ninety days after the date the member first becomes entitled to retired or retainer pay (10 U.S.C. § 1408(d)(1)).

In the case of *Mansell v. Mansell*, 490 U.S. 581, 109 S.Ct. 2023, 104 L.Ed. 2d 675 (1989), the question was whether or not the California Courts could include the disability monies received by the member in place of retirement benefits as a community property asset to be divided wherein the disability pay is specifically exempted under 10 U.S.C. § 1408(4). *The United States Supreme Court determined that only where there is a plain and precise language of the statute, that language will preempt the state court's authority.* (Emphasis added.) Memorandum of Decision and Order, Petitioner's Appendix, page 21a.

III. The U.S. Supreme Court has long recognized that domestic relations are preeminently matters of State law.

On the rare occasion when state family law has come into conflict with a federal statute, this Court has limited review under the Supremacy Clause to a determination whether Congress has "positively required by direct enactment" that state law be preempted. *Hisquierdo v. Hisquierdo,*

439 U.S. 572, 581 (1978); *Whetmore v. Markoe*, 196 U.S. 68, 77 (1904).

> Because domestic relations are preeminently matters of state law, we have consistently recognized that Congress, when it passes general legislation, rarely intends to displace state authority in this area. *Mansell v. Mansell*, 490 U.S. 581, 587 (1989); *see e.g. Rose v. Rose*, 481, U.S. 619, 628 (1987); *Hisquierdo, supra.*

Section 1408 must directly preempt the action taken by the Idaho Supreme Court in order for such action to be improper.

CONCLUSION

Federal law was properly considered in this case. 10 U.S.C. Section 1408 does not preclude the Court's action in this case. Petitioner was not forced to apply for retirement or to retire, and there was no specific preemption within the applicable statute. If state was preempted, power to divide the community property retirement benefit was restored by the USFSPA.

Respondent, Sherry Mae Balderson, respectfully requests that this Court deny the Petition for Writ of Certiorari submitted by the Petitioner, Gerald Elmer Balderson.

RESPECTFULLY SUBMITTED this 15th day of August, 1995.

WILSON, CARNAHAN & MCCOLL
DEBRHA JO CARNAHAN
FRANCES R. STERN
Attorneys for Respondent
420 W. Washington
P.O. Box 1544
Boise, Idaho 83701

APPENDIX

CONTENTS OF APPENDIX

Page

Findings of Fact and Conclusions of Law of the Magistrate Court Division of the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Ada 1a

Opinion of the Supreme Court of the State of Idaho 1b

APPENDIX "A"

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

SHERRY MAY BALDERSON, Plaintiff, vs. GERALD ELMER BALDERSON, Defendant.	Case No. 11195-D FINDINGS OF FACT AND CONCLUSIONS OF LAW (Filed Nov. 13, 1992)

Appearances: Debrha J. Carnahan, for the plaintiff
Jean R. Uranga, for the defendant

On August 26th, 1992, the above-entitled matter was called for trial. At that time, the parties announced that they had entered into a Stipulation of Facts, an unsigned copy of which was provided to the court, which was subject to certain oral modifications or clarifications described in open court. The stipulation reflected that there was no dispute over the character, value and division of all community property and debts with the exception of the community interest in the defendant's military retirement benefits. In fact, following the trial, an order was entered upon the parties' stipulation that provided for the division of property and debts except for the retirement benefits. At trial, evidence was presented on the extent and divisibility of the military retirement benefits, and upon equities the court might consider in dividing those benefits. Post trial briefs were then submitted, the last of which was received on September 29th, 1992. The case was considered fully submitted on that date.

The following findings of fact and conclusions of law are issued pursuant to Rule 52(a), I.R.C.P., on the remaining disputed issues:

FINDINGS OF FACT:

1. Sherry May Balderson (Sherry) and Gerald Elmer Balderson (Gerald), were married on August 20th, 1970, in Council, Idaho.

2. Two children were born as issue of this marriage. Stacy Marie Balderson was born on March 4th, 1971, and is thus, over the age of majority. Robert Loyd Balderson was born on September 20th, 1974. He reached age 18 shortly after the trial was completed. The parties' stipulation provided that Gerald would assume responsibility for a loan incurred to pay for Robert's education in lieu of any monthly award of support while Robert continues his education.

3. Gerald entered active duty in the Navy on May 20th, 1969. He had been in the Navy for precisely 15 months when he married Sherry.

4. In 1973, Gerald left the Navy and worked briefly as a lumberjack. He and Sherry agreed he should re-enlist and make the Navy his career. He again entered active duty in 1974 after a ten month absence, and has been on active duty ever since.

5. As of the date of trial, Gerald had 22 years and 5 months, or a total of 269 months of active duty credits.

6. Deleting the 15 months earned prior to marriage, he was on active duty for 254 months during the marriage.

7. Gerald became eligible to retire from active duty following 20 years of service. At that time he held a W2 pay grade.

8. Instead of retiring, Gerald entered into a re-enlistment contract which provided for a promotion to a level W3 pay grade. Under that contract he agreed to forego retirement and remain on active duty until September of 1994.

9. If Gerald retired as of the date of trial at the W3 pay grade, he would have been entitled to receive 2½ percent of his basic pay for that grade ($2,829.90), multiplied by the total years of active service. In his calculation, less than six months of a year is disregarded while more than six months counts as an additional year of service. Thus, Gerald's retirement benefit calculated as of trial would be 2.5% of $2,829.90 multiplied by 22 years, or $1,556.45 per month.

10. The community portion of this amount would be 254/269 times $1,566.45, or $1,479.10 per month.

11. The parties did not stipulate to, or submit evidence on the present value of the community portion of the military retirement benefits. Both acknowledge, however, there is insufficient property to make an offsetting award of other property equal to the lump sum value of the military retirement benefits.

12. Gerald does not plan to retire until he has 30 years of active duty, which will be in slightly less than 8 years. His benefits would be substantially greater with those additional years of service.

13. Gerald's current base pay is $2,829 per month. He also receives various housing or cost of living allowances which depend upon his obligation to support dependents and his service at sea. At present, he actually receives $1,800 every two weeks as gross pay. The difference between the sum of those two figures and his base pay represents the current level of allowances he receives.

14. Sherry will have difficulty meeting her monthly living expenses on her current level of income and has a present need and desire to immediately receive her share of the military retirement benefits rather than wait until Gerald retires in eight more years.

CONCLUSIONS OF LAW:

1. This court has jurisdiction over the parties and the subject matter of this action.

2. All issues in this case have been resolved by stipulation except for the valuation and distribution of the community interest in Gerald's military retirement benefits. Gerald has twenty-two years and five months of active duty with the Navy. Twenty one years and two months of that time accrued during his marriage with Sherry. Although he could have retired after twenty years of active duty, he chose not to. He now plans to retire after thirty years of active duty.

3. Military retirement benefits, like other types of retirement benefits, to the extent they are earned during marriage, must be characterized as community property. *Maslen v. Maslen*, 121 Idaho 85, 822 P.2d 982 (1991); *Griggs v. Griggs*, 107 Idaho 123, 686 P.2d 68 (1984); *Shill v. Shill*,

100 Idaho 433, 599 P.2d 1004 (1979); *Ramsey v. Ramsey*, 96 Idaho 672, 535 P.2d 53 (1975).

4. However, the court may treat only the "disposable retired pay" as community property. 10 U.S.C.S. Section 1408(c)(1); *Mansell v. Mansell*, 490 U.S. 581, 109 S.Ct. 2023, 104 L.Ed.2d 675 (1989), impliedly overruling *Beesley v. Beesley*, 114 Idaho 536, 758 P.2d 695 (1988); *Bewley v. Bewley*, 116 Idaho 845, 780 P.2d 596 (Ct.App. 1989).

5. The value or extent of the community interest in retirement benefits must be established as of the time of divorce. *Maslen v. Maslen*, 121 Idaho 85, 822 P.2d 982 (1991); *Shill v. Shill*, 115 Idaho 115, 765 P.2d 140 (1988); *Desfosses v. Desfosses*, 120 Idaho 354, 815 P.2d 1094 (Ct.App. 1991).

6. If the employee spouse is eligible to retire but has not retired at the time of divorce, then the valuation of the community interest must be based upon the monthly sum which could have been received as of the date of divorce. *Maslen v. Maslen*, supra; *Shill v. Shill (II)*, supra.

7. Applying these principles to the facts found above, I find that as of the date of trial, based upon his current pay grade and years of service, Gerald had accumulated the right to receive a monthly benefit of $1,566.45 even though he had chosen not to retire. In the absence of any evidence that Gerald would have had deductions from that amount permitted under 10 U.S.C.S. Section 1408(A)(4) if he had retired as of the date of trial, this amount will be considered his hypothetical disposable retired pay for the purpose of computing the value

of the community interest. The community portion of that sum, which is based upon the years of service which accrued during the marriage, is $1,479.10. Sherry's one-half interest in this monthly sum would be $739.55.

8. Gerald is presently committed to remain on active duty until 1994. He received a promotion to his present pay grade as a result of that commitment. However, I conclude that this commitment to serve beyond the date of divorce does not affect the value of his retirement benefits. His commitment will merely delay his receipt of benefits, but he will at some point, enjoy the benefits of the pay grade he achieved during marriage. All increased benefits caused by his post-trial service, will be his exclusively. I see no reason why the community interest should not be valued as of the date of trial, upon Gerald's present pay grade and years of service.

9. Sherry has requested an immediate distribution of her share of these retirement benefits. She argues that she should not be deprived of her share of these benefits because of Gerald's decision to invoke a condition entirely within his control. Gerald, on the other hand, argues that an order for immediate payment would be contrary to the specific restrictions found in the USFSPA.

10. These issues have been specifically addressed in other jurisdictions. The majority view appears to follow the ruling in *In Re Marriage of Gillmore,* 174 Cal.Rptr. 493, 629 P.2d 1 (1981). In *Gillmore,* the California Supreme Court held that an employee spouse cannot by his or her unilateral choice to postpone retirement, deprive the non-employee spouse of his or her interest in the retirement

benefits. The non-employee spouse was entitled to immediate payment of her share of the retirement benefits.

11. Gerald points to a contrary view expressed in *Ruggles v. Ruggles*, 834 P.2d 940 (New Mexico 1992). In *Ruggles*, the New Mexico Supreme Court rejected the ruling in *Gillmore* for a number of reasons. First and foremost was the fact that *Gillmore* permitted a lump sum payment to the non-employee spouse before the date of retirement. In New Mexico, lump sum awards are not permitted. Pension benefits must be awarded on a "pay as it comes in" basis. Id. Next, the court was concerned about equalizing the risk that the retirement benefits may never actually be received. Requiring the non-employee to wait would ensure equality of risk. Finally, the court felt that the non-employee's rights were derivative of the community's rights. The non-employee should receive no greater right than that directly provided by the community asset itself. This means waiting until the actual benefits are received under the terms and conditions of the retirement plan.

12. Comparing the principles found in Idaho cases to these two divergent views, Idaho appears to be clearly more aligned with the *Gillmore* approach. Our Supreme Court has consistently approved of lump sum awards to the non-employee spouse since that method was established in *Ramsey*. Although *Shill I* approved of reserving jurisdiction to value and divide contingent pension benefits, there is no justification to extend that case beyond its facts. There the court was dealing with a non-vested, contingent benefit, which would vest, if at all, within six months of the divorce. This is much different than a case where benefits are vested, matured, but not being

received solely because of the decision of the employee spouse. Despite *Sill I*, our Supreme Court again approved the lump sum distribution method in *Maslen v. Maslen*, supra, as did our Court of Appeals in *Desfosses*, supra, where the employee spouse had not yet retired. Certainly, a lump sum award is an acceptable method of distribution in Idaho where the benefits are vested, matured and actually being received. *Shill v. Shill II*, supra; *Beesley v. Beesley*, 114 Idaho 536, 758 P.2d 695 (1988), impliedly overruled on other grounds by *Mansell v. Mansell*, 490 U.S. 581, 109 S.Ct. 2023, 104 L.Ed.2d 675 (1989).

13. In *Shill II* our Supreme Court acknowledged the risks inherent in making an immediate lump sum award, but gave its continued approval of such awards:

> Many of the above-cited cases deal with the "risks" which will be encountered by each of the spouses under various theories of distribution of pension benefits upon divorce. It is clear that there can be no amelioration of all risks which might be presented by the enumerable possible scenarios. If, as previously stated, a lump sum cash-out method were utilized, as seems possible in the instant case, the risks to the non-employee spouse would have been eliminated. However, the risk to the employee spouse of death preventing him from receiving any benefits, would remain. Nevertheless, such solution would have the merit of disentangling the parties and their affairs at a finite point in time. Id., p-120.

Unlike the New Mexico Supreme Court in *Ruggles*, our Supreme Court places more emphasis on the immediate

right of each party to possess their share of the community property and disentangling the parties financially, than on the risks inherent in a lump sum cash-out.

14. In *Shill II*, our Supreme Court followed the reasoning of the Arizona Supreme Court in *Koelsch v. Koelsch*, 713 P.2d 1234 (Ariz. 1986), in ruling that a non-employee spouse has no right to share in increased retirement benefits which accrue following divorce. The *Koelsch* case also followed the *Gillmore* rule that one spouse cannot defeat the other's interest in retirement benefits by unilaterally choosing not to retire. The rationale for that decision was similar to that found in Idaho cases. Once a portion of the community retirement benefits is awarded to the non-employee spouse, it becomes that spouse's separate property, the use and control of which belongs exclusively to that individual. Id., p-1239.

15. Lump sum awards have been approved because of the long line of Idaho authority requiring the court to distribute community property in such a way as to give each party immediate control over their respective share. The court in *Gillmore* based on this same concept – the right of each spouse to utilize and control their share of benefits at the time of divorce. The court in *Koelsch*, a decision cited by our Supreme Court with approval on other issues, reached a similar conclusion. Both appear to be consistent with Idaho principles of community property law, while the *Ruggles* decision does not. Therefore, I conclude that an employee spouse cannot deprive the non-employee spouse of immediate enjoyment of his or her share of retirement benefits by making a unilateral decision to continue working after the date of first eligibility for retirement.

16. In 1982, Congress passed the Uniformed Services Former Spouses Protection Act (USFSPA), 10 U.S.C. Section 1408. The USFSPA gave state courts the authority to characterize a service member's disposable military retirement pay as marital property and also provided for the direct distribution of the non-employee spouse's portion of those benefits under certain conditions. The Act prohibits state courts from ordering a service member to apply for retirement or to retire at some particular time in order to have payments distributed under the Act. 10 U.S.C. Section 1408(c)(3). Gerald argues this provision of the Act prohibits a court from making any award of benefits before actual retirement, otherwise a court would be indirectly forcing a service member to retire.

17. This issue has been specifically addressed in three California appellate decisions. In each decision, the court rejected Gerald's argument and awarded the non-employee spouse the present value of military retirement benefits even though the service member had not yet retired. *In Re Marriage of Scott*, 156 Cal. App.3d 251, 202 Cal.Rptr.716 (Cal.App.4 Dist. 1984); *In Re Marriage of Jacobson*, 161 Cal.App.3d 465, 207 Cal.Rptr. 512 (Cal.App.2 Dist. 1984); *In Re Marriage of Castle*, 180 Cal.App.3d 206, 225 Cal.Rptr. 382 (Cal.App. 4 Dist. 1986). In *Castle* the court pointed out that the doctrine of *Gillmore* was specifically cited to the Senate prior to the passage of the USFSPA. See U.S.Code Cong. & Admin. News, pp. 1596, 1639. Yet, the act was passed giving the states power to apply their own local law to the characterization and division of disposable military retirement pay, subject only to the specific limitations of the Act. Upon this authority, I conclude that the USFSPA does not prevent

this court from awarding the non-employee spouse his or her interest in the disposable military retirement pay before the employee spouse actually retires.

18. The final issue to be addressed is the most difficult one. Even though Sherry has the right to immediate enjoyment of her share of the retirement benefits, valued at the time of divorce, how can the court effectively distribute those benefits to her under the particular circumstances of this case. A Qualified Domestic Relations Order is not applicable to military retirement benefits. Direct payment from the government under the USFSPA cannot be ordered until actual retirement. There is insufficient property to make an offsetting award of other property equal to the value of the retirement benefits. The only other option that has been specifically discussed and approved in Idaho is a lump sum judgment payable in installments within a reasonable time. *Ramsey v. Ramsey,* supra; *Beesley v. Beesley,* supra. However, I do not believe that these are the only alternatives this court can consider merely because they are the only ones which have been discussed by our appellate courts. The decisions cited above reflect that new alternatives are periodically reviewed and approved. While the *Ramsey* court appeared to lay down an unequivocal rule which required a lump sum award of the present value of retirement benefits to the non-employee spouse, the court subsequent acknowledged that an offsetting award of property would be acceptable, and direct monthly payments under USFSPA for military benefits or by a Qualified Domestic Relations Order for other qualified private plans, could also be ordered. In *Maslen,* the court acknowledged the difficulty not only in valuing benefits

under very different retirement plans, but also the difficulty in dividing those benefits. Rather than mandate particular treatment of retirement benefits in every case, the court stated "[W]e conclude that it is a better policy to allow the trial court sufficient discretion to consider the circumstances in each case to determine the most equitable manner for determining and dividing the marital portion of pension benefits". *Maslen v. Maslen*, supra.

19. The court in *Koelsch* provides some excellent guidance on the very dilemma facing this court. Where the right to receive retirement benefits has matured, but the employee spouse continues to work, the most preferable method is a lump sum award which is payable in full at a specified time, or payable in installments which may or may not correspond with the amount the employee spouse would have received if the employee spouse had retired. *Koelsch v. Koelsch*, supra, p-1242. This award should include the payment of interest and could be secured by a lien on any or all of the employee spouse's separate property. Id. However, if a lump sum award would be impossible or inequitable, the court could award the non-employee spouse a monthly amount equal to the share of the benefit which would have been received if the employee spouse had retired. Id. p-1243. If the employee spouse does retire, then both interests could be paid directly to each by the plan administrators, or, in cases of military retirement, by the federal government. Id.

20. The last option which the court in *Koelsch* left open under very limited circumstances, would be to defer all or part of the non-employee's monthly payments until

the employee spouse retires. Under this alternative, however, the non-employee spouse would be entitled to recover all of the deferred payments with interest, the payment of which would be secured by a lien on the employee spouse's separate property or by a separate policy of insurance naming the non-employee spouse as irrevocable beneficiary in an amount sufficient to pay the differed payments and interest. Id., p-1243.

21. The objective in selecting the best alternative was described in *Koelsch* in the following way:

> We urge the parties and the trial court to be as creative and flexible as possible, within the guidelines provided in this opinion, to both guarantee that the non-employee spouse will receive his or her share of the pension benefits and to avoid the undesirable consequence of encouraging employees to retire against their wishes. p-1243.

22. I believe the best of the options described above would be that which would require Gerald to pay Sherry her $739.55 share of the retirement benefits she would have received had he chosen to retire as of the date of divorce until such time as he does retire when that sum can be paid directly to her under the USFSPA. I consider this to be the best option under the circumstances of this case for the following reasons: (1) there is not enough other community property to make a lump sum, offsetting award of other property to Sherry; (2) Gerald's income is limited and it would not appear to be feasible that he could pay off a lump sum award in installments within a reasonable time; (3) This option gives Sherry immediate access to her share of retirement benefits as

our Idaho law dictates; (4) Gerald does appear to have the ability to pay this sum without being compelled to retire; (5) This option clearly segregates the community interest from any separate interest Gerald might accrue following divorce; (6) it avoids the problem of significant fluctuations in present value which are caused by the application of different mortality tables and different discount rates; (7) It fairly places the risk of death before retirement upon the party who has made the decision to continue working.

23. Sherry has requested that Gerald be ordered to maintain survivor benefits in her favor and that she be permitted to share in any future cost of living increases. Although this court is not fully acquainted with survivor benefit options for military retirees, it does appeal that Gerald may be eligible to make an election to purchase an annuity for Sherry under the Survivor Benefit Plan for the armed forces under 10 U.S.C.A. Section 1448. Such an election, if taken after retirement, would automatically reduce Gerald's retired pay by an amount equal to the cost of the annuity. In light of *Mansell v. Mansell,* and the way the USFSPA reads, it would appear that the intent of the statute is that just as disability income cannot be affected by local laws, the amount deducted for this type of annuity cannot as well. 10 U.S.C.S. Section 1408(4)(D). I conclude that if Sherry desires to have this protection, she will have to bear the cost of the annuity. If the election can be exercised after 20 years of service but before actual retirement, the cost of the annuity would be paid by Gerald, but deducted from his payment of $739.55 to Sherry. After retirement, the amount paid

directly to Sherry under the USFSPA would be reduced by the cost of the annuity.

24. Sherry may request Gerald to make the election for such an annuity within 60 days of the entry of this Decree, or at any subsequent time that Gerald is permitted to make such an election under the provisions of the Survivor's Benefit Plan, 10 U.S.C.S. Section 1448.

25. After actual retirement, Sherry will be entitled to a percentage share of any cost of living increase awarded to Gerald. That percentage will be a fraction where the numerator is 254 months, which is the number of months of service accrued during the marriage, and the denominator is the total months of service at retirement. See *Utz v. Utz*, Ada County Case No. 13998-D, Findings of Fact and Conclusions of Law issued December 16th, 1991, pp.14-19.

26. Counsel for the plaintiff is requested to submit a proposed form of judgment which incorporates the relief awarded in this decision and the relief awarded upon the parties' stipulation.

It is so ORDERED this 13th day of November, 1992.

/s/ Michael Dennard
MICHAEL DENNARD
Magistrate

APPENDIX "B"

IN THE SUPREME COURT OF THE STATE OF IDAHO
DOCKET NO. 21354

SHERRY MAY BALDERSON,	)	**Boise, September 1994**
	)	**Term**
Plaintiff-Respondent	)	
	)	**1995 Opinion No. 45**
vs.	)	
GERALD ELMER BALDERSON,	)	**Filed: May 22, 1995**
	)	
	)	**Frederick C. Lyon, Clerk**
Defendant-Appellant.	)	
	)	

Appeal from the District Court of the Fourth Judicial District of the State of Idaho, in and for Ada County. Hon. Robert G. Newhouse, District Judge; Hon. Michael Dennard, Magistrate Judge.

Appeal from the magistrate court's valuation of military retirement benefits upon divorce and the court's distribution of a sum equal to one-half the community interest in the benefits. *Affirmed* in part, *Vacated* in part, and *Remanded.*

Uranga, Uranga & Bieter, Boise, for appellant. Jean R. Uranga argued.

Wilson, Carnahan & McColl, Boise, for respondent. Debrha J. Carnahan argued.

McDEVITT, C.J.

I.

BACKGROUND AND PROCEDURE

Gerald and Sherry Balderson were married on August 20, 1970. Gerald entered active duty in the Navy on May 20, 1969, fifteen (15) months prior to his marriage to Sherry. Gerald left the Navy for a short time in 1973, but re-enlisted for active duty in 1974. The decision to re-enlist was made by both parties with the understanding that the Navy would be Gerald's career. Gerald has been on active duty in the Navy since re-enlisting in 1974. Under Gerald's re-enlistment contract, he would receive a promotion and, in return, Gerald would forego retirement until September 1994. Even though Gerald was eligible for retirement in 1994, he chose to remain in the military until he had completed 30 years of active duty. Gerald will attain 30 years of service in the year 2000, approximately eight years from the time of divorce, and he intends to retire at that time.

In August of 1989, Sherry initiated divorce proceedings. At the date of trial, Gerald has been on active duty for twenty-two (22) years and five (5) months, or 269 months. Not including the fifteen months of duty prior to marriage, Gerald was on active duty for a total of 254 months during marriage. In the divorce, there was no dispute as to the character, value, and division of all community property, with the exception of the community interest in Gerald's military retirement benefits. Sherry sought one half of Gerald's military retirement pension earned during marriage.

The magistrate court valued the community interest in the military retirement benefits at $1,479.10 per month. This amount was based on Gerald's time spent in the military during marriage as compared to his total time of service as of the date of divorce. The magistrate court then ordered Gerald to pay Sherry in installments a sum equal to her one-half interest in the benefits, $739.55 per month. The magistrate court awarded the benefits to be paid in installments because there were insufficient assets to make an offsetting lump sum award to Sherry and because this award effectively gave Sherry immediate control over her community share in the retirement benefits without compelling Gerald to retire.

Gerald appealed the decision of the magistrate court which was affirmed by the district court. The district court modified the magistrate court's decision to permit Gerald to petition the magistrate court for re-examination of its order if it is determined that $739.55 equals more than fifty percent of his monthly "disposable retired or retainer pay" under the Uniform Services Former Spouses Protection Act (USFSPA), 10 U.S.C. § 1408(e)(1).

Gerald then appealed the district court's ruling. The Court of Appeals agreed with the district court's ruling and affirmed the magistrate court's decision as amended. Gerald then petitioned this Court for a review of the Court of Appeal's decision. On review Gerald argues that the Supremacy Clause of the United States Constitution precluded the magistrate court from ordering Gerald to begin making immediate payments to Sherry for her interest in Gerald's military retirement benefits under 10 U.S.C. § 1408(c)(3). Gerald also argues that the magistrate court erred by failing to order payment of Sherry's share

of the retirement benefits not commence until Gerald retired. Gerald argues that the retirement benefits should be valued at the time Gerald actually retires rather that at the time of divorce. Both parties seek attorney's fees on appeal.

This Court affirms in part, vacates in part, and remands this case to the magistrate court.

II.

PREEMPTION ISSUE

When this Court reviews issues first decided in the magistrate court, which are then presented to the district court on appeal, this Court reviews the magistrate court's decision independently of, but with due regard for, the district court's appellate decision. *Ireland v. Ireland*, 123 Idaho 955, 957-58, 855 P.2d 40, 42-43 (1993). This Court will uphold the findings of the magistrate court if the findings are supported by substantial and competent evidence. *McNelis v. McNelis*, 119 Idaho 349, 351, 806 P.2d 442, 444 (1991). However, issues of law are freely reviewed by this Court. *In re Mundell*, 124 Idaho 152, 153, 857 P.2d 631, 632 (1993).

Because the magistrate court ordered a distribution of the sum equal to Sherry's interest in the military retirement benefits, rather than distributing the pension benefits themselves, we hold that the magistrate court did not err in concluding that Idaho law was not preempted by 10 U.S.C. § 1408(c)(3).

The Uniform Services Former Spouses Protection Act (USFSPA) gives courts the authority to treat disposable

military retired or retainer pay as community property in accordance with the laws of the court's jurisdiction, subject to specific limitations in the Act. 10 U.S.C. § 1408(c)(1). The USFSPA's limits on state courts which are relevant to this proceeding are (1) that only disposable retirement income may be considered as community property, (2) that a court may not order a military member to retire in order to effectuate a payment of retirement benefits, and (3) that no more than fifty percent of the disposable retired or retainer pay may be paid out. 10 U.S.C. §§ 1408(c)(1), (c)(3), (d)(1). There is no authority in the Act for a court to order direct payments of the military retirement benefits before actual retirement. The magistrate court's order recognized this, and instead of awarding Sherry an interest in the pension benefits, which the court could not do, it awarded Sherry the value of a sum equal to her interest in the pension benefits.

The magistrate court is not precluded by the USFSPA from valuing the community property interest in the benefits and distributing the other assets of the community to account for the value of the benefits. Pursuant to this authority, the magistrate court calculated the value of the community interest in the retirement benefits and the value of Sherry's one-half interest in the benefits. The magistrate court then awarded Sherry an amount equal to her interest in the retirement benefits.

The magistrate court did not exceed its grant of authority under the USFSPA because it only valued the military retirement benefits under community property principles and did not divide or distribute the actual pension benefits at the time of divorce. The magistrate court did not interfere with the purposes of the USFSPA

to allow for the distribution of military retirement benefits under community property laws.

We affirm the decision of the magistrate court to the extent that the magistrate court only assessed the value of the military retirement benefits under Idaho community property law.

III.

VALUATION AND DISTRIBUTION ISSUES

The next issue which must be addressed is whether the magistrate court properly valued and distributed the disputed community assets. The trial court has sufficient discretion to consider the circumstances of each case and decide the most equitable manner for valuing and dividing the marital portion of pension benefits. *Maslen v. Maslen,* 121 Idaho 85, 91, 822 P.2d 982, 988 (1991). In reviewing the magistrate court's disposition of community property, this Court will not disturb the disposition unless there is evidence of an abuse of discretion. *Koontz v. Koontz,* 101 Idaho 51, 52, 607 P.2d 1325, 1326 (1980); *see also Olsen v. Olsen,* 125 Idaho 603, 606, 873 P.2d 857, 860 (1994) (vacating and remanding the decision of the trial court where it applied the inappropriate rates to capitalize excess earnings and to discount for marketability in determining the value of the marital interest in the closely held corporation).

A. VALUATION

This Court has recognized different methods of valuing pension plans, such as the time rule method and the

accrued benefit method. *Maslen*, 121 Idaho at 89-90, 822 P.2d at 986-87. Because retirement benefit plans are so varied in their provisions, funding, and administration, valuation cases are to be decided on an individual basis. *Id.* at 91, 822 P.2d at 988; *Shill v. Shill*, 115 Idaho 115, 120, 765 P.2d 140, 145 (1988) (*Shill II*). The benefits should be valued at the time of divorce, because benefits acquired after the divorce are the separate property of the employee spouse. *Id.*

The magistrate court was within its discretion to determine the method of distribution of community assets, and we will not disturb this magistrate court's installment method of distribution of the Baldersons' community assets. However, in applying this method of distribution, the valuation of the community interest in the retirement benefits requires a discounting of the benefits to their present day value as of the date of divorce. If the benefits are not discounted to their present value, the value assessment does not accurately reflect the non-employee spouse's actual interest in the benefits, and the value of the benefits can be inflated, resulting in an inequitable distribution of the assets.

The magistrate court calculated the community interest in the disposable military retirement benefits as being the amount Gerald would receive as of the date of divorce based on his date of divorce income and his time spent in active service during the marriage, or $1,479.10 per month.[1] Sherry's interest in the benefits was determined to be one-half of the community interest, or

---

[1] The magistrate court in calculating the amount of retirement benefits Gerald was to receive, multiplied his total number

$739.55 per month. The magistrate court properly considered the benefits that were earned during the marriage in its valuation of the community interest in the retirement benefits, but it failed to calculate the present value of those benefits by calculating the lump sum future value of Gerald's retirement benefits and discounting that sum to its present-day value prior to determining the value of Sherry's interest in the benefits and distributing the assets.

B. DISTRIBUTION

Under I.C. § 32-712(1)(a), the trial court has the power to distribute community property in an equitable manner unless there are compelling reasons to distribute the property otherwise. The general rule is that the trial court should, if possible, order the disposition of the community property upon divorce to give each spouse sole and immediate control of his or her determined share. *Maslen v. Maslen*, 121 Idaho 85, 92, 822 P.2d 982, 989 (1991). However this rule must be applied within the confines of Idaho's statutes which delineate separate and community property interests. I.C. §§ 32-903, 32-906; *Shill II*, 115 Idaho 115, 118, 765 P.2d 140, 143 (1988); *Maslen*, 121

---

of years in the service as of the date of divorce by his pay grade at the date of divorce. (2.5% (the percentage of pay Gerald would receive) X $2829.90 (Gerald's pay grade at divorce) X 22 years (rounded off duration of active service) = $1,556.45.) The community portion of this amount was calculated to be $1,479.10 ($1,556.45 X 254/269 (number of months in service during marriage/total number of months in service.))

Idaho at 94, 822 P.2d at 991 (McDevitt, J. concurring in the result).

In *Shill v. Shill*, 100 Idaho 433, 599 P.2d 1004 (1979) (*Shill I*), this Court recognized two possible methods for dividing a pension plan: "[o]ne is to award the employee the pension and assign the non-employee-spouse assets of a value equal to the present value of the contingent benefits." (the "lump sum" method) "The other method of dividing the rights is to reserve jurisdiction until retirement and divide the actual monetary benefit when received." (the "as if, and when" method) *Id.* at 437, 599 P.2d at 1008. However, in situations like the present one, where the largest marital asset is the retirement benefit and an inequitable division of the pension benefits would result from using either of the first two methods, this Court has recognized another method of dividing the assets. *Beesley v. Beesley*, 114 Idaho 536, 541-42, 758 P.2d 695, 702-03 (1988). This method of distributing the benefits allows a court to make an award of installment payments in lieu of a lump sum award. *Id.* When an award is made under the installment method, the interest accruing on the award at the rate used to discount the retirement benefits to their present value is to be awarded to the recipient spouse. *Id.*

Although a lump sum award is the preferred method of distribution, the magistrate court was within its discretion to consider the circumstances of this case and to decide that the lump sum method paid in installments was the most equitable manner for valuing and dividing the marital portion of pension benefits. *Maslen*, 121 Idaho at 91, 822 P.2d at 988. The magistrate court's method of distribution of a determined lump sum in installments

gave Sherry immediate control of a sum equal to her determined share of the benefits paid out over time. Insufficient property was available to make an offsetting award equal to the value of the retirement benefits, and the other methods of distribution would have resulted in an inequitable division of the retirement benefits.

This distribution method is in accord with Idaho's case law and furthers the policies of separating the parties' interests in the property. The parties have immediate control over their interest in the community property and a lesser risk to future expectations of a contingent interest in the retirement benefits.

The magistrate court did not abuse its discretion in ordering Gerald to begin making immediate payments to Sherry of an amount equal to her interest in the military retirement benefits. However, the magistrate court did not correctly calculate the interest to which Sherry is entitled. Because Sherry was awarded a sum equal to her interest in the retirement benefits to be paid in installments, she is entitled to interest accrued at the rate used to discount the retirement benefits to their present value. *Beesley,* 114 Idaho at 541, 758 P.2d at 702.

The decision of the magistrate court is vacated to the extent that it failed to discount the community interest in the retirement benefits to their present day value and remanded for a calculation of the present day value of the community interest in the retirement benefits for purposes of distributing to Sherry a sum equal to one-half that value. Also on remand the magistrate court is to calculate the interest on the installment payments to which Sherry is entitled.

IV.

ATTORNEY'S FEES

Both parties request attorney's fees on appeal. Gerald requests attorney fees pursuant to I.C. § 12-121. Idaho Code § 12-121 provides that a judge may award reasonable attorney's fees in any civil action to the prevailing party. Generally reasonable attorney's fees will only be awarded to the prevailing party under I.C. § 12-121 when the court is left with the "abiding belief that the appeal was brought, pursued or defended frivolously, unreasonably and without foundation." *Minich v. Gem State Developers, Inc.*, 99 Idaho 911, 918, 591 P.2d 1078, 1085 (1979). There is no basis in the record that Sherry defended the suit frivolously, unreasonably and without foundation. No attorney's fees are awarded to Gerald.

Sherry requests attorney fees pursuant to I.C. § 32-704. Idaho Code § 32-704(3) provides that a court may consider the financial resources of both parties and the factors set forth in I.C. § 32-705 to determine whether a party is entitled to an award of attorney fees. *Ireland v. Ireland*, 123 Idaho 955, 960, 855 P.2d 40, 45 (1993). In considering Sherry's financial resources, this Court holds that she has sufficient financial resources and declines to enter an order requiring Gerald to pay Sherry's fees.

V.

CONCLUSION

The decision of the magistrate court is affirmed in part, vacated in part and remanded for further proceedings consistent with this opinion. Costs to Appellant.

Justices TROUT, SILAK, and Justice Pro Tem Reinhardt, **CONCUR.**

JOHNSON, Justice, **dissenting.**

I respectfully dissent. In my view, the magistrate judge's order requiring Gerald to begin making immediate payments to Sherry for her interest in Gerald's military retirement benefits violates the Supremacy Clause of the U.S. Constitution because 10 U.S.C. § 1408(c)(3) and other provisions of USFSPA preempt the judge's authority to do so.